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STATE CONSTITUTIONS AND STATUTES AS SOURCES OF RIGHTS FOR THE MENTALLY DISABLED: THE LAST FRONTIER?*

Michael L. Perlin**

I. INTRODUCTION

The evocation of a past, halcyon "golden age" is a popular and familiar concept, whether the subject matter is opera, rock 'n' roll, baseball or television drama. Nostalgic images are warmly recalled of prima donnas who could *really* sing, of guitarists who could *really* rock, of sluggers who could *really* hit and of dramatists who could *really* write. More cynical commentators have suggested, though, that some of these images are a bit distorted. Every generation, they suggest, has its own "golden age" (roughly akin to those years of one's youth or adolescence when one discovers the subject matter in question). Having grown up in the New York metropolitan area in the early 1950's, I am still convinced that that *was* the golden age of baseball (1951 [Willie Mays and Mickey Mantle arrive] to 1957 [the Giants and Dodgers depart for the West Coast], for purists), but I suppose I am willing—in the abstract, at least—to concede the commentators' point.

On the other hand, if we look at the years 1972 to 1978 (which, not so coincidentally, cover my youthful years as a litigator), we may agree that these were, from the perspective of attorneys advocating on behalf of the mentally disabled, the "golden age" of federal litigation. Consider briefly the developments in the Supreme Court, the lower federal courts, and Congress during those years.

First, and perhaps most importantly, *institutionally*, the federal courts were undergoing significant change. The "hands off" doctrine¹—

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1. See, e.g., *Banning v. Looney*, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954); *Siegel v. Ragan*, 180 F.2d 785, 788 (7th Cir. 1950). See generally Robbins & Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV.

which had, to a great extent, precluded relief in virtually all types of institutional reform cases—was being slowly abandoned.² Simultaneously, the scope of the due process and equal protection clauses was being expanded in cases brought on behalf of a wide variety of minority groups³ and others,⁴ many of whom could broadly be characterized as coming within the protective confines of footnote 4 of *United States v. Carolene Products Co.*⁵ Also, the scope of relief available under 42 U.S.C. section 1983⁶ expanded exponentially following the Supreme Court's decision in *Monroe v. Pape*.⁷ Further, a phenomenon becoming known as "public interest law"⁸ was taking root, through which it ap-

893, 898-99 (1977); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963). The early history of prison law—and the initial successful attacks on this doctrine—is traced skillfully in Alexander, *The New Prison Administrators and the Court: New Directions in Prison Law*, 56 TEX. L. REV. 963, 964-65 (1978).

The argument that adequacy of treatment in a mental institution was a "nonjusticiable" question was specifically rejected by the Supreme Court in *O'Connor v. Donaldson*, 422 U.S. 563 (1975): "That argument is unpersuasive. Where 'treatment' is the sole asserted ground for depriving a person of liberty, it is *plainly unacceptable* to suggest that the courts are powerless to determine whether the asserted ground is present." *Id.* at 574 n.10 (emphasis added).

2. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) (there is "no curtain drawn between the Constitution and the prisons of this country"); see also Robbins & Buser, *supra* note 1, at 930 (federal intervention is a "last, but viable, resort" in prison conditions cases as a means of "charting the perimeters of a maturing society").

3. The paradigmatic case is *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

4. See, e.g., *Finney v. Hutto*, 548 F.2d 740 (8th Cir. 1977) (prison inmates), *aff'd*, 437 U.S. 678 (1978), *reh'g denied*, 439 U.S. 1122 (1979); *Rhem v. Malcolm*, 527 F.2d 1041 (2d Cir. 1975) (pretrial detainees); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (students in need of special education services); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) (retarded children).

For an excellent analysis of the characteristics which the mentally ill share with other minority groups (e.g., juveniles, women and ethnic minorities), see Fleming, *Shrinks vs. Shysters: The (Latest) Battle for the Control of the Mentally Ill*, 6 LAW & HUM. BEHAV. 355, 356 (1982) (lack of social power; controlled by an identifiable sociopolitical group; subject to control based upon a "[benign] stated motivation [justified by] the helplessness of the controlled group").

5. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see also Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

6. 42 U.S.C. § 1983 (1982).

7. 365 U.S. 167, 183 (1961). The Court's construction of § 1983 in *Monroe*—that plaintiffs may sue state officials directly to redress constitutional violations even where state law provides a remedy—transformed the statute into "a major vehicle for general litigation in the federal courts." *Parratt v. Taylor*, 451 U.S. 527, 544 n.13 (1981); see also Eckhardt & Eckhardt, 42 U.S.C. § 1983: *A Primer for the Civil Rights Lawyer*, 20 IDAHO L. REV. 585, 586 (1984) (*Monroe* enabled § 1983 to become "the primary remedy for redressing deprivations of federal constitutional rights").

8. The seminal article is Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). See generally M. MELTSNER & P. SCHRAG, PUBLIC INTEREST

peared inevitable that classically "hidden" and disenfranchised groups such as the mentally disabled⁹ would replicate the experiences of *other* similarly-situated groups, turning to the apparently friendly confines of the federal courts in an effort to seek vindication of fundamental constitutional and civil rights.¹⁰

In a wide variety of cases brought on behalf of the mentally ill and the mentally retarded, federal district courts and courts of appeals thus began to apply due process principles to such questions as substantive limitations on the civil commitment power,¹¹ the applicability of the "least restrictive alternative" doctrine to both commitment and treatment matters,¹² the right of involuntarily confined individuals to treat-

ADVOCACY (1974); Harrison & Jaffe, *Public Interest Law Firms: New Voices for New Constituencies*, 58 A.B.A. J. 459 (1972); McKay, *Civil Litigation and the Public Interest*, 31 U. KAN. L. REV. 355 (1983); Rabin, *Lawyers for Social Change: Perspectives in Public Interest Law*, 28 STAN. L. REV. 207 (1976).

9. See, e.g., *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3266 (1985) (Marshall, J., concurring in part and dissenting in part) (mentally retarded have been subject to "lengthy and tragic" history of segregation and discrimination that can only be called grotesque"). The majority's ruling in *Cleburne*—applying rational basis scrutiny to legislative classification affecting the mentally retarded—is analyzed critically in *The Supreme Court, 1984 Term—Leading Cases*, 99 HARV. L. REV. 120, 161-67 (1985); Comment, *City of Cleburne, Tex. v. Cleburne Living Center, Inc.: The Mentally Retarded and the Demise of Intermediate Scrutiny*, 20 VAL. U.L. REV. 349 (1986); Margulies, *The Newest Equal Protection: City of Cleburne v. Cleburne Living Center and Discrimination Against Group Homes for the Mentally Disabled* (1986) (unpublished manuscript) (to be published in 3 N.Y.L. SCH. HUM. RTS. ANN.).

10. See Perlin, *Rights of Ex-Patients in the Community: The Next Frontier?*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 33 (1980).

[Recent] development[s] of mental health rights law must be seen as a logical culmination of the expansion of such parallel fields as civil rights, consumer rights, criminal procedure, and inmates' rights: to a large extent, mental health law is at the crossroads of all of those paths, as an outgrowth of a process by which lawyers have become able to contribute to "public consciousness of inequities or shortcomings in the society" through "substantive concerns with issues of social policy."

Id. at 34 (footnotes omitted); see also *id.* at 41 nn.30A-30C. See generally Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982). But see Nagel, *On Complaining About the Burger Court* (Book Review), 84 COLUM. L. REV. 2068, 2081 (1984) (The Warren Court has been glorified and enshrined "because of a need for heroes," and "because of a need for deeper roots in a political community—for ties and loyalties that could reduce the need for moral simplicity in public affairs.").

11. See, e.g., *Suzuki v. Quisenberry*, 411 F. Supp. 1113 (D. Haw. 1976); *Doremus v. Farrell*, 407 F. Supp. 509 (D. Neb. 1975); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976).

12. See, e.g., *Romeo v. Youngberg*, 644 F.2d 147 (3d Cir. 1980), *vacated and remanded*, 457 U.S. 307 (1982), *on remand*, 687 F.2d 33 (3d Cir. 1982); *Scott v. Plante*, 641 F.2d 117 (3d Cir. 1980), *vacated and remanded*, 458 U.S. 1101 (1982), *on remand*, 691 F.2d 634 (3d Cir. 1982); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966), *cert. denied*, 382 U.S. 863 (1965);

ment,¹³ their right to refuse the imposition of certain medical treatments,¹⁴ their right to practice civil rights while institutionalized¹⁵ and even the right to deinstitutionalization or community treatment.¹⁶

The United States Supreme Court appeared to be signalling that it was comfortable with this trend. In his 1972 opinion for the Court in *Jackson v. Indiana*,¹⁷ Justice Blackmun applied the due process clause to

Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 573, *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957 (1975), *on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976).

13. See, e.g., *Welsch v. Litkins*, 373 F. Supp. 487 (D. Minn. 1974); *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341 (M.D. Ala. 1971) (later opinion), 344 F. Supp. 373 (M.D. Ala. 1972) (later opinion), 344 F. Supp. 387 (M.D. Ala. 1972) (later proceeding), *aff'd in part and remanded in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

Judge Frank Johnson, the trial judge in *Wyatt*, has written extensively about his concept of the general role of the federal judiciary in public interest litigation. See, e.g., Johnson, *In Defense of Judicial Activism*, 28 EMORY L.J. 901 (1979); Johnson, *The Legal Profession and Social Change*, 28 ALA. L. REV. 1 (1976); Johnson, *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271 (1981). Judge Johnson has been praised as a "phenomenon who . . . has almost single-handedly, as a *tour de force*, transfigured institutional care of the mentally ill." Heller, *Extension of Wyatt to Ohio Forensic Patients*, in WYATT V. STICKNEY: RETROSPECT AND PROSPECT 161, 172 (L. Ralph Jones & R. Parlour eds. 1981). On the role of the judge in such litigation, see generally Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979). In *Dent v. Duncan*, Judge Rives wrote:

I look forward to the day when the State and its political subdivisions will again take up their mantle of responsibility. . . and thereby relieve the federal Government of the necessity of intervening in their affairs. Until that day arrives, the responsibility for this intervention must rest with those who through their ineptitude and public disservice have forced it.

360 F.2d 333, 337-38 (5th Cir. 1966) (Rives, J., concurring specially).

On the question of implementing judicial decrees in such cases, see Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978); Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977). On the financial implications of such decrees, see Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978).

14. See, e.g., *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), *modified*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984); *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978), 476 F. Supp. 1294 (D.N.J. 1979) (supplemental opinion), *modified*, 653 F.2d 836 (3d Cir. 1981), *vacated and remanded*, 458 U.S. 1119 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983).

15. See, e.g., *Davis v. Balson*, 461 F. Supp. 842 (N.D. Ohio 1978).

16. See, e.g., *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1978), *modified*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981), *reinstated*, 673 F.2d 647 (3d Cir. 1982), *rev'd*, 465 U.S. 89 (1984).

There have been 28 published opinions on various aspects of the *Pennhurst* case. For a complete list, see *Halderman v. Pennhurst State School & Hosp.*, 610 F. Supp. 1221, 1222 (E.D. Pa. 1985).

17. 406 U.S. 715 (1972).

the nature and duration of civil commitment and offered this now-famous "cue bid" to aspiring litigants representing mentally disabled individuals: "Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on [the commitment] power have not been more frequently litigated."¹⁸

Three years later, in *O'Connor v. Donaldson*,¹⁹ the Court, per Justice Stewart, recognized that certain nondangerous, mentally ill individuals have a "right to liberty" and added:

A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in custodial confinement. Assuming that the term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.²⁰

It is no wonder that within days after the *O'Connor* decision was published, advocates for patients²¹ and prominent psychiatrists²² were predicting that thousands of long-term patients would be deinstitutionalized as a result of that opinion.²³

18. *Id.* at 737.

19. 422 U.S. 563 (1975).

20. *Id.* at 575.

21. See, e.g., Grant, Donaldson, *Dangerousness, and the Right to Treatment*, 3 HASTINGS CONST. L.Q. 599, 608 n.45 (1976) (citing N.Y. Times, June 27, 1975, at 36, col. 3 (quoting Bruce Ennis, Kenneth Donaldson's counsel before the Supreme Court)).

22. See, e.g., Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 143-44 (1984) (quoting a July 8, 1975, television interview with Dr. Alan Stone, Chairman for Judicial Action of the American Psychiatric Association); *id.* at 144 n.1044 (citing *Opening the Asylums*, TIME, July 7, 1975, at 44, regarding an estimate by American Psychiatric Association officials that 90% of compulsorily detained mental patients were not sufficiently dangerous to themselves or others to require hospitalization in light of the *O'Connor* standard).

23. These predictions initially appeared excessive. See, e.g., Comment, *O'Connor v. Donaldson: The Death of the Quid Pro Quo Argument for a Right to Treatment?*, 24 CLEV. ST. L. REV. 557, 571 (1975). A decade of experience has revealed, however, that to some extent the expected deinstitutionalization has occurred. In Virginia, for example, where the state's statutory scheme was rewritten "in partial anticipation" of *O'Connor*, the state institutional population was reduced from 17,000 to 10,000 within five years of the new law's enactment. Allerton, *An Administrator Responds*, in PAPER VICTORIES AND HARD REALITIES: THE IMPLEMENTATION OF THE LEGAL AND CONSTITUTIONAL RIGHTS OF THE MENTALLY DISABLED 17, 18 (1976).

On the multiple causes of deinstitutionalization, see generally Bassuk & Gerson, *Deinstitutionalization and Mental Health Services*, 238 SCI. AM. 46 (1978); Ewing, *Health Planning and Deinstitutionalization: Advocacy Within the Administrative Process*, 31 STAN. L. REV. 679 (1979); Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L.J. 595 (1983); Mills & Cummins, *Deinstitutionalization Revisited*, 5 INT'L J.L. & PSYCHIATRY 271

Finally, Congress also appeared to recognize the plight of the disabled by enacting the Developmentally Disabled Assistance and Bill of Rights Act (DD),²⁴ the Education of the Handicapped Act (EHA)²⁵ and section 504 of the Rehabilitation Act of 1973.²⁶ Congress stated that "[p]ersons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities"²⁷ and that treatment "should be provided in the setting that is least restrictive of the person's personal liberty."²⁸ Congress prohibited discrimination against the handicapped in any program or activity receiving federal aid²⁹ in order "to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs"³⁰

Speaking on the Senate floor in support of the DD bill, Senator Javits, one of its chief sponsors, spoke eloquently and persuasively on behalf of a far-reaching act, using language that appeared to reflect Congress' intent in enacting the law: "Congress should reaffirm its belief in equal rights for all citizens—including the developmentally disabled. Congress should provide the leadership to change the tragic warehousing of human beings that has been the product of insensitive Federal support of facilities providing inhumane care and treatment of the mentally retarded."³¹

(1982); Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 EMORY L.J. 375 (1982); Williams, *Deinstitutionalization and Social Policy: Historical Perspectives and Present Dilemmas*, 50 AM. J. ORTHOPSYCHIATRY 54 (1980).

24. 42 U.S.C. §§ 6000-6083 (Supp. III 1985).

25. 20 U.S.C. §§ 1400-1460 (1982 & Supp. III 1985).

26. 29 U.S.C. § 794 (1982).

27. 42 U.S.C. § 6009(1) (Supp. III 1985).

28. *Id.* § 6009(2).

29. 29 U.S.C. § 794 (1982) provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency." *Id.*

30. 20 U.S.C. § 1400(c) (1982).

31. 121 CONG. REC. 16,519 (1975). Quoting Thomas Wolfe, the late Senator Humphrey once said:

"To every man his chance; to every man, regardless of his birth, his shining, golden opportunity—to every man the right to live, to work, to be himself, and to become whatever thing his manhood and his vision can combine to make him—this, seeker, is the promise of America."

Cook, *The Provision of Health and Rehabilitation Services to Disabled Persons Under the Federal Rehabilitation Act*, 12 CLEARINGHOUSE REV. 693 (1979) (quoting 118 CONG. REC. 525 (1972) (remarks of Sen. Humphrey)).

Speaking in support of § 504, Secretary of Health, Education and Welfare Joseph Califano was no less eloquent: "For decades, handicapped Americans have been oppressed and, all too often, a hidden minority, subjected to unconscionable discrimination, beset by

In short, it appeared that this was truly the beginning of a "golden age," and that mental disability advocates would continue to focus—virtually³² to the exclusion of state courts³³—on the federal court as a preferred forum for litigation. Subsequent developments, however, revealed that early responses to what was perceived as the Supreme Court's encouragement of this sort of litigation were, to be conservative, somewhat exaggerated. Consider *these* occurrences in the past eight years.

demoralizing indignities, detoured out of the mainstream of American life and unable to secure their rightful role as full and independent citizens.' " DuBow, *Combatting Handicap Discrimination with Title V of the Rehabilitation Act of 1973: Employment and Other Rights*, in LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 1431, 1433 (1979) (quoting statement by Secretary Califano of Apr. 27, 1977); see also *id.* at 1438-39 (discussing regulatory history of § 504).

Similarly, the Senate Report which accompanied the Education of the Handicapped Act (EHA) articulated a clear statement of purpose:

This Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue.

S. REP. NO. 168, 94th Cong., 1st Sess., reprinted in 1975 U.S. CODE CONG. & ADMIN. NEWS 1425, 1433.

Early analyses of § 504 and the EHA were unabashedly optimistic, an optimism that grew more cautious as time passed. See, e.g., Cook, *Nondiscrimination in Employment Under the Rehabilitation Act of 1973*, 27 AM. U.L. REV. 31, 75 (1977) (section 504 is "a potential vehicle for integrating disabled persons into the nation's work force"); Mayerson & Gill, *After Davis—Are The Civil Rights Of Disabled People In Jeopardy?*, 15 CLEARINGHOUSE REV. 579, 581 (1981) ("Disability rights advocates must [now] proceed with great caution in litigating [§] 504 cases"); Wolff, *Protecting the Disabled Minority: Rights and Remedies Under Sections 503 and 504 of the Rehabilitation Act of 1973*, 22 ST. LOUIS U.L.J. 25, 68 (1978) (significance of Rehabilitation Act of 1973 is "obvious" and impact "is expected to be extensive"); Note, *Enforcing Section 504 Regulations: The Need for a Private Cause of Action to Remedy Discrimination Against the Handicapped*, 27 CATH. U.L. REV. 345, 346 (1978) (section 504's potential has "hardly been realized"); Note, *The Education For All Handicapped Children Act: Opening The Schoolhouse Door*, 6 N.Y.U. REV. L. & SOC. CHANGE 43, 63 (1976) (EHA has "good prospect of success"); Comment, *§ 504 and the HEW Regulations: Effectuating the Rights of the Handicapped*, 5 OHIO N.U.L. REV. 107, 132 (1978) (after regulations promulgated, "§ 504 at last has the vitality it has lacked for so long"); see also *infra* note 93.

32. Mental disability advocates, however, have not *completely* excluded seeking relief from state courts. See, e.g., *State v. Krol*, 68 N.J. 236, 344 A.2d 289 (1975) (extending procedural due process rights to insanity acquittees, and subsequently defining "dangerousness" for involuntary civil commitment purposes).

33. See Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1124 (1977) ("Even if state and federal forums were of equal technical competence, a series of psychological and attitudinal characteristics renders federal district judges more likely to enforce constitutional rights vigorously."). Neuborne also noted:

Federal district judges, appointed for life and removable only by impeachment, are as insulated from majoritarian pressures as is functionally possible, precisely to ensure their ability to enforce the Constitution without fear of reprisal. State trial judges, on the other hand, generally are elected for a fixed term, rendering them vulnerable to majoritarian pressure when deciding constitutional cases.

Id. at 1127-28.

First, the Supreme Court has made it clear in cases arising from a variety of fact patterns that it is, at the least, unsympathetic, and at the worst, overtly hostile, to both the abstract notion of "public interest law" and to the use of the federal courts as vehicles for wide-ranging institutional reform. Writing for the majority in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*,³⁴ Justice Rehnquist left no doubts as to his views on this issue: "[Respondents] claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court. The federal courts were simply not constituted as ombudsmen of the general welfare."³⁵

On institutional reform in particular, the Supreme Court has rejected the notion that courts could assume that state legislatures and institutional officials "are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of [an institutional] system."³⁶

Most importantly, through a series of opinions beginning—not coincidentally for these purposes—with *Pennhurst State School & Hospital v.*

34. 454 U.S. 464 (1982).

35. *Id.* at 487 (footnote omitted). In *United States v. Richardson*, Justice Powell wrote: "[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens." 418 U.S. 166, 192 (1974) (Powell, J., concurring).

36. *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981); see also *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."); *id.* at 548 ("the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial"). But see, Nagel, *A Comment on the Burger Court and "Judicial Activism,"* 52 U. COLO. L. REV. 223, 226 (1981) (discussing response to *Bell* of the district court in *Valentine v. Engelhardt*, 474 F. Supp. 294, 301 (D.N.J. 1979)).

Throughout the early 1970's, many federal courts deciding penal and mental disability cases—as well as a wide variety of cases arising in other factual settings—used special masters and other alternative enforcement mechanisms to implement broad and far-reaching equitable decrees. Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 U. TOL. L. REV. 419, 421-23 (1979); Reynolds, *The Mechanics of Institutional Reform Litigation*, 8 FORDHAM URB. L. J. 695 (1979-1980); Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753, 754-55 nn.4 & 6 (1984); Special Project, *supra* note 13, at 431. See generally FED. R. CIV. P. 53. These methods were especially appealing in cases posing "polycentric problem[s] that cannot easily be resolved through a traditional courtroom-bound adjudicative process" and involved a "multitude of choices affecting [social] resources." *Hart v. Community School Bd.*, 383 F. Supp. 699, 766 (E.D.N.Y. 1974). To some extent, no doubt, this reflected the Supreme Court's attitude when it dealt with school desegregation cases, i.e., the "imaginative expansion of federal equity powers to deal with deprivations of constitutional

Halderman (Pennhurst II),³⁷ the Court has expanded the scope of the eleventh amendment.³⁸ This move has drastically curtailed federal suits against state officials in cases seeking relief under either pendent state jurisdiction³⁹ or federal statutes.⁴⁰

rights." Robbins & Buser, *supra* note 1, at 897 (citing *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 28 (1971)).

For a sample of pertinent cases, see Brakel, *Special Masters in Institutional Litigation*, AM. B. FOUND. RES. J. 543, 544 n.4 (1979); Levine, *supra*, 760-61 nn.22-24. For a survey of the literature analyzing the use of masters in such cases, see Brakel, *supra*, at 546 n.14; Levine, *supra*, at 759 n.20. For a description of the elaborate review panel established to monitor compliance with the court's order in the *Willowbrook* case, see *New York Ass'n for Retarded Children v. Carey*, 596 F.2d 27, 32-34 (2d Cir. 1979). For a functional analysis of how monitoring decrees work, see McCormack & Mandel, *How to Manage an Institution During Litigation*, 9 MENTAL & PHYSICAL DISABILITY L. REV. 73 (1985). For excellent overviews of the historical authority for appointment of masters in institutional cases, see *Hart*, 383 F. Supp. at 764-66; Levine, *supra*.

The Supreme Court has in recent years expressed clear hostility to this sort of institutional reform effort. See, e.g., Brant, Pennhurst, Romeo, and Rogers: *The Burger Court and Mental Health Law Reform Litigation*, 4 J. LEGAL MED. 323, 348 (1983) (recent Supreme Court decisions reflect a "clear signal" that the Court does not want the federal courts overseeing the operation of facilities for the mentally disabled).

Although the Supreme Court granted *certiorari* in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), on the question of whether a district court abused its discretion in the appointment of two masters to supervise state officials in their implementation of state law in a mental disability institutional reform case, it did not reach that issue in its opinion. *Id.* at 96-97; see, e.g., *Union County Jail Inmates v. DiBuono*, 713 F.2d 984 (3d Cir. 1983), *reh'g denied*, 718 F.2d 1247 (3d Cir. 1983), *cert. denied sub nom.* *DiBuono v. Fauver*, 465 U.S. 1102 (1984).

37. 465 U.S. 89; see also *Green v. Mansour*, 106 S. Ct. 423 (1985); *Atascadero State Hosp. v. Scanlon*, 105 S. Ct. 3142 (1985).

38. *Pennhurst*, 465 U.S. at 97-100; see, e.g., Schwartz, *The Eleventh Amendment and State Law Claims*, 18 CLEARINGHOUSE REV. 151 (1984); Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984). Pertinent scholarship is collected in Note, *The Eleventh Amendment's Lengthening Shadow over Federal Subject Matter Jurisdiction: Pennhurst State School & Hospital v. Halderman*, 34 DE PAUL L. REV. 515, 515 n.1 (1985).

39. *Pennhurst*, 465 U.S. at 117-21; see also *id.* at 121 ("neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment").

The *Pennhurst* facility has been described within the past 15 years as a "Dachau, without ovens." Note, *The "Right" to Habilitation: Pennhurst State School & Hospital v. Halderman and Youngberg v. Romeo*, 14 CONN. L. REV. 557 (1982) (quoting L. LIPPMAN & I. GOLDBERG, *RIGHT TO EDUCATION* 17 (1973)).

40. *Atascadero*, 105 S. Ct. at 3147 ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute," rejecting claim against state official premised on § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1985)). See generally Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363 (1985); Lehrer, *Expanding the States' Eleventh Amendment Immunity (Again): A Comment on Atascadero State Hospital v. Scanlon and Green v. Mansour*, 20 CLEARINGHOUSE REV. 3 (1986). For an analysis of *Atascadero* from an eleventh amendment perspective prior to the Supreme

I personally agree with the views expressed on this matter by Professors Rudenstine,⁴¹ Sherry⁴² and Chemerinsky⁴³: (1) the *Pennhurst II* majority wants to limit lower federal court power to reform state and local institutions on the basis of alleged *federal* law violations as well;⁴⁴ (2) court reform of penal and mental institutions will be countenanced only in "extreme circumstances";⁴⁵ (3) the Justices' opposition to judicially-ordered social reform stems from a hostility to the litigants' underlying substantive claims;⁴⁶ (4) the current Supreme Court is "deeply committed to protecting the states from intrusion by the federal judiciary";⁴⁷ (5) the Court's true agenda is to transform its role from the guardian of individual rights to that of "guardian of majority rule";⁴⁸ and, ultimately, (6) *Pennhurst II* threatens to "undermine the ability of the federal courts to remedy state and local government violations of the United States Constitution."⁴⁹ Whether or not these scholars are correct is not crucial; the significance of the *Penhurst II* line of cases lies in the undeniable fact that, at least until there is a significant restructuring of the Supreme Court,⁵⁰ the terrain of federal courts will prove to be far more hostile to suits brought on behalf of the mentally disabled than it

Court's decision, see Note, *The Eleventh Amendment and State Damage Liability Under the Rehabilitation Act of 1973*, 71 VA. L. REV. 655 (1985).

41. Rudenstine, *Judicially Ordered Social Reform: Neofederalism and Neonationalism and the Debate Over Political Structure*, 59 S. CAL. L. REV. 451 (1986) [hereinafter Rudenstine I]; Rudenstine, *Pennhurst and the Scope of Federal Judicial Power to Reform Social Institutions*, 6 CARDOZO L. REV. 71 (1984) [hereinafter Rudenstine II].

42. Sherry, *Issue Manipulation by the Burger Court: Saving the Community From Itself*, 70 MINN. L. REV. 611 (1986).

43. Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment after Pennhurst v. Halderman*, 12 HASTINGS CONST. L.Q. 643 (1985).

44. Rudenstine II, *supra* note 41, at 83. His major source for this analysis, see *id.* at 83-84, is footnote 13 of *Pennhurst II*, which reads:

We do not decide whether the District Court would have jurisdiction under this reasoning to grant prospective relief on the basis of *federal law*, but we note that the scope of any such relief would be constrained by principles of comity and federalism. "Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'"

Pennhurst II, 465 U.S. at 104 n.13 (quoting *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951))) (emphasis added).

45. Rudenstine II, *supra* note 41, at 109.

46. Rudenstine I, *supra* note 41, at 482. Professor Rudenstine sees this, however, as an "incomplete theory . . . because it accounts only for what Justices' [] do not value, and leaves undefined the values they prize." *Id.* at 483.

47. Sherry, *supra* note 42, at 631.

48. *Id.* at 663.

49. Chemerinsky, *supra* note 43, at 645.

50. The Court has, of course, shown a willingness to reverse itself fairly rapidly in other areas of constitutional law. For example, the Court, in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, *reh'g denied*, 471 U.S. 1049 (1985), recently overruled *National League of*

was a decade ago.⁵¹

Second, on mental disability issues, the Supreme Court has expressed what can charitably be referred to as mixed signals. On commitment issues, while the Court mandated certain due process rights in cases involving prison-hospital transfers⁵² and "split the difference" on the question of the appropriate burden of proof,⁵³ it rejected the argument that broad procedural due process protections apply to such diverse "special" populations as juveniles,⁵⁴ insanity acquittees⁵⁵ and sex offenders.⁵⁶ In *French v. Blackburn*⁵⁷ the Court also summarily affirmed⁵⁸ a district court decision which approved a set of commitment procedures that provided patients with significantly fewer due process protections than were countenanced by earlier cases following the rationale first articulated in 1972 in *Lessard v. Schmidt*.⁵⁹ In *French*, questions concerning the need for a compulsory probable cause hearing,⁶⁰ appropriate notice⁶¹ and a jury trial,⁶² as well as questions regarding the patient's presence at a commitment hearing⁶³ such as the applicability of the privi-

Cities v. Usery, 426 U.S. 833 (1976), substituting a more limited federalism inquiry where Congress acts pursuant to its power to regulate interstate commerce.

51. See generally Neuborne, *supra* note 33.

52. *Vitek v. Jones*, 445 U.S. 480 (1980) (right to notice, hearing, confrontation, cross-examination, an independent decisionmaker, statement of reasons and "qualified and independent assistance"); see also *id.* at 497-500 (Powell, J., concurring).

53. *Addington v. Texas*, 441 U.S. 418 (1979).

54. *Parham v. J.R.*, 442 U.S. 584 (1979).

55. *Jones v. United States*, 463 U.S. 354 (1983).

56. *Allen v. Illinois*, 106 S. Ct. 2988 (1986).

57. 428 F. Supp. 1351 (M.D.N.C. 1977), *aff'd*, 443 U.S. 901 (1977).

58. The Supreme Court has made it clear that a summary affirmance, while serving as a ruling on the merits, *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975), has "considerably less precedential value than an opinion on the merits." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979); see also *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). Summary action on a case "represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. It does not . . . necessarily reflect our agreement with the opinion of the court whose judgment is appealed." *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 474 (1979); see also *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) ("the rationale of the affirmance may not be gleaned solely from the opinion below"). This line of authority is generally traced to *Fusari v. Steinberg*, 419 U.S. 379, 390-91 (1975) (Burger, C.J., concurring). See generally Comment, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda*, 76 COLUM. L. REV. 508 (1976).

59. See *Lessard*, 349 F. Supp. 1078.

60. *French*, 428 F. Supp. at 1355-56.

61. *Id.* at 1356-57.

62. *Id.* at 1360-62.

63. *Id.* at 1357-58.

lege against self-incrimination in commitment matters⁶⁴ and the appropriate burden of proof were resolved against the disabled.⁶⁵

On substantive constitutional issues, the Court announced a right to "minimally adequate or reasonable training to ensure safety and freedom from undue restraint" for the mentally disabled⁶⁶ and "assumed" that involuntarily confined patients retained some constitutionally-protected liberty interests which are "implicated by the involuntary administration of antipsychotic drugs."⁶⁷ The Court, however, also clearly indicated that it would give extraordinary deference to the exercise of professional judgment in institutional cases,⁶⁸ especially where damages were sought.⁶⁹ As the Court stated explicitly in *Youngberg v. Romeo*: "By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operation of the institutions should be minimized."⁷⁰

While reading the tea leaves of "vacate and remand in the light of" opinions can be foolhardy,⁷¹ the Court's decision to remand *Rennie v. Klein*⁷² in light of *Youngberg* rather than in light of *Mills v. Rogers*⁷³ cannot be brushed off as unimportant. This decision reflected a clear statement on the Court's part that the *Youngberg* test should govern virtually all substantive institutional cases.⁷⁴

On the issue of the role of expert testimony in cases involving mentally disabled criminal defendants,⁷⁵ the Court has remained overwhelm-

64. *Id.* at 1358-59.

65. *Id.* at 1359-60.

66. *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982).

67. *Mills v. Rogers*, 457 U.S. 291, 299 n.16 (1982).

68. *Youngberg*, 457 U.S. at 322; see also Alexander, *supra* note 1, at 963 (recent Supreme Court decisions "display a tolerance for and even a deference to the new prison administrators' values").

69. *Youngberg*, 457 U.S. at 323 (in damages action against professional in his individual capacity, professional will not be liable if unable to satisfy normal professional standards because of "budgetary constraints").

70. *Id.* at 322 (footnote omitted).

71. See Hellman, "Granted, Vacated, and Remanded"—*Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389, 390 (1984) (such decisions employ the "most puzzling mode of disposition in the Supreme Court's repertory").

72. 458 U.S. 1119 (1982). See generally Perlin, Can Mental Health Professionals Predict Judicial Decisionmaking? Constitutional and Tort Liability Aspects of the Right of the Institutionalized Mentally Disabled to Refuse Treatment: At the Cutting Edge (1986) (unpublished manuscript) (to be published in 3 TOURO L. REV.).

73. 457 U.S. 291.

74. For a survey of cases, see Perlin, *Patients' Rights*, in 3 PSYCHIATRY 4, 18 nn.61-64 (1986).

75. Matters affecting mentally disabled criminal defendants are generally beyond the scope of this paper. See generally Perlin, *The Supreme Court, The Mentally Disabled Criminal Defendant, Psychiatric Testimony in Death Penalty Cases, and the Power of Symbolism: Dulling*

ingly ambivalent, and seemingly, irreconcilably inconsistent.⁷⁶ At the penalty phase of a capital punishment case, the Court, in *Barefoot v. Estelle*,⁷⁷ allowed into evidence responses to hypotheticals on the future danger of defendant by experts who never examined the defendant.⁷⁸ The Court blithely⁷⁹ assured us that jurors can separate the "wheat from the chaff"⁸⁰ in such testimony.⁸¹ Yet, the Court also held in *Ake v. Oklahoma*⁸² that an indigent defendant facing the death penalty has a right to expert psychiatric assistance where he makes an "ex parte threshold showing . . . that his sanity is likely to be a significant factor in his defense,"⁸³ in light of "the [extremely high] risk of an inaccurate resolution of sanity issues."⁸⁴

Although there has been a profound split in the lower federal courts' interpretations of each of these signals by the Supreme Court,⁸⁵ the fact is inescapable that the Court has not—either covertly or overtly—encouraged expansive decisionmaking in institutional cases brought on behalf of the mentally disabled.⁸⁶

Similarly, in construing federal statutes, the Court has given mostly crabbed readings of the laws in question. Justice Rehnquist, in

the Ake in Barefoot's Achilles Heel, 3 N.Y.L. SCH. HUM. RTS. ANN. 91 (1985). In addition to cases discussed *infra* at text accompanying notes 76-84, see also *Smith v. Murray*, 106 S. Ct. 2661 (1986); *Ford v. Wainwright*, 106 S. Ct. 2595 (1986); *Wainwright v. Greenfield*, 106 S. Ct. 634 (1986); *Jones v. United States*, 463 U.S. 354 (1983); *Estelle v. Smith*, 451 U.S. 454 (1981).

76. See Perlin, *supra* note 75, at 164-69.

77. 463 U.S. 880, *reh'g denied*, 464 U.S. 874 (1983).

78. *Id.* at 902-05.

79. See *id.* at 916, 928-30 (Blackmun, J., dissenting).

80. *Id.* at 901 n.7.

81. But see *id.* at 916 (Blackmun, J., dissenting) ("In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself.").

82. 470 U.S. 68 (1985).

83. *Id.* at 82-83.

84. *Id.* at 82.

85. See, e.g., Perlin, *supra* note 74, at 4-5, 8, 18-19 nn.54-82E, 19-20 nn.126-44; Perlin, *supra* note 75. For particularly expansive readings, see *Clark v. Cohen*, 794 F.2d 79 (3d Cir.), *cert. denied*, 107 S. Ct. 459 (1986); *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir.), *cert. denied*, 106 S. Ct. 1992 and 107 S. Ct. 235 (1986). For a narrow interpretation, see *Phillips v. Thompson*, 715 F.2d 365 (7th Cir. 1983). One opinion in *Clark* characterized *Phillips'* interpretation of *Youngberg* as "simply incorrect." *Clark*, 794 F.2d at 87, 97 n.12 (Becker, J., concurring).

On the important issue of applying *Pennhurst II* to previously entered institutional consent decrees, see *Lelsz v. Kavanagh*, 629 F. Supp. 1487 (N.D. Tex. 1986) (community placement of the mentally retarded); *De Gidio v. Perpich*, 612 F. Supp. 1383 (D. Minn. 1985), *rev'd*, 807 F.2d 1243 (5th Cir. 1987) (prison medical care).

86. For a recent non-institutional case, see *United States Dep't of Treasury v. Galioto*, 106 S. Ct. 2683 (1986) (equal protection challenge to blanket statutory ban on purchase of firearms by former mental patients).

Pennhurst I,⁸⁷ brushed aside the Third Circuit's careful analysis of the DD Act and rejected plaintiffs' arguments that broad relief could be structured under that law. The Court found that the legislation was little more than a federal-state grant funding mechanism⁸⁸ and that nothing in the Act suggested that Congress had intended to require the states to "assume the high cost of providing 'appropriate treatment' in the 'least restrictive environment' to their mentally retarded citizens."⁸⁹ Academic commentary on this decision was almost entirely critical, reading the opinion as "eschew[ing] . . . logic,"⁹⁰ "distort[ing] the major issue" in a "contorted framing" of the case,⁹¹ and as reflecting a "general hostility toward law reform efforts on the merits."⁹²

While the Supreme Court's decisions interpreting section 504 of the Rehabilitation Act and the Education of the Handicapped Act have been somewhat conflicting,⁹³ it is also clear that these laws will not be con-

87. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981).

88. *Id.* at 11.

89. *Id.* at 18.

90. Ferleger & Scott, *Rights and Dignity: Congress, the Supreme Court, and People With Disabilities After Pennhurst*, 5 W. NEW ENG. L. REV. 327, 356 (1983). Ferleger was lead counsel for plaintiffs in the *Pennhurst* case.

91. *Id.* at 352.

92. Brant, *supra* note 36, at 342.

The Court has clearly stated that notions of federalism limit federal court interference in state activity, and require the judiciary to leave major policy decisions to other executive officials. The Court's policy of deference manifests itself not only in its substantive unwillingness to approve sweeping orders for institutional reform, but in its use of procedural devices to make the bringing of law reform cases more difficult.

Id. at 331-32 (footnotes omitted).

93. For recent analyses of relevant § 504 cases, see *Alexander v. Choate*, 469 U.S. 287 (1986); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); see also Richards, *Handicap Discrimination in Employment: The Rehabilitation Act of 1973*, 39 ARK. L. REV. 1 (1985); Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401 (1984); Note, *The Price of Discrimination: Proposed Entitlement to Compensatory Relief Under Section 504 of the Rehabilitation Act of 1973*, 47 ALB. L. REV. 1307 (1983); Note, *The Discrimination Statutes and the Supreme Court's 'Program' for Confusion*, 17 CONN. L. REV. 629 (1985); Note, *Safeguarding Equality for the Handicapped: Compensatory Relief under Section 504 of the Rehabilitation Act*, 1986 DUKE L.J. 197.

The Supreme Court's most recent § 504 decisions, *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 106 S. Ct. 2705 (1986), and *Bowen v. American Hosp. Ass'n*, 106 S. Ct. 2101 (1986), have held, respectively, that § 504 did not apply to commercial airlines, rejecting a challenge to certain Civil Aeronautics Board (CAB) regulations which had exempted most such airlines from their regulatory scope, and that a hospital's decision to withhold treatment from severely handicapped newborns did not violate § 504. The Supreme Court recently decided that a school teacher afflicted with tuberculosis comes within the protective scope of

strued as broadly as its proponents had hoped.⁹⁴

As a result of these developments, the notion of wide-ranging institutional and procedural reform in federal court cases involving the mentally disabled no longer appeared to be "an idea in good currency." It appeared that the "pendulum" had shifted⁹⁵ and that, in cases where the

§ 504. See *School Bd. v. Arline*, 55 U.S.L.W. 4245 (U.S. Mar. 3, 1987), *affirming* 772 F.2d 759 (11th Cir. 1985).

In *Board of Education v. Rowley*, 458 U.S. 176, 200-04 (1982), the Court established a basic "floor of opportunity" by construing the EHA to set as its goals equal access, rather than equal opportunity for handicapped children. *Id.* at 201. The access need only be "sufficient to confer some educational benefit upon the handicapped child." *Id.* at 200. Critical response to *Rowley* has been nearly uniformly hostile. See, e.g., Note, *Board of Education v. Rowley: Landmark Roadblock or Another Signpost on the Road to State Courts*, 16 CONN. L. REV. 149 (1983) [hereinafter *Landmark*]; Note, *Crippling the Education of all Handicapped Children Act: Board of Education v. Rowley*, 12 STETSON L. REV. 791 (1983); Comment, *The Education for All Handicapped Children Act Since 1975*, 69 MARQ. L. REV. 51, 70-75 (1985).

In *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), the Court held that clean intermittent catheterization is a "related service" required by the EHA. *Id.* at 887-95; see also 20 U.S.C. § 1401(17) (1982). The provision of the EHA requiring services limited to those that "may be required to assist a handicapped child to benefit from special education" is discussed in Comment, *supra*, at 76. The author there stated: "Once again, the Court set forth a legally sound, theoretical standard, but failed to devise concrete, substantive guidelines to aid special educators in determining when a service does, in fact, benefit a child's education." *Id.* Another commentator has noted that "[u]nfortunately, the guarantees of [the EHA] are not yet functionally clear." Note, *School Health Services for Handicapped Children: The Door Opens No Further*, 64 NEB. L. REV. 509, 536 (1985); see also *Burlington School Comm. v. Department of Educ.*, 471 U.S. 359 (1985) (reimbursement for private education expenses); *Smith v. Robinson*, 468 U.S. 992 (1984) (interplay between EHA and § 504 on question of availability of attorneys' fees); Goodwin, *Public School Integration of Children With Handicaps After Smith v. Robinson: "Separate But Equal" Revisited?*, 37 ME. L. REV. 267, 299 (1985) ("One may ask whether *Smith* is the harbinger of legally sanctioned 'separate but equal' schools for the handicapped."). For a recent survey of all cases, see Zucker, *Rights of the Handicapped: Education*, ANN. SURV. OF AM. L. 575 (1984).

Among the most difficult questions still unresolved under both § 504 and the EHA are their applicability to persons with AIDS. See, e.g., Jones, *The Education for All Handicapped Children Act: Coverage of Children with Acquired Immunity Deficiency Syndrome*, 15 J.L. & EDUC. 195 (1986).

94. One of § 504's co-sponsors, Senator Harrison Williams, had articulated its intent as "plac[ing] special emphasis on the target populations whose needs were not being met, and to grapple with problems, which while not related solely to rehabilitation, pose serious problems for handicapped individuals in becoming employed, staying employed, and generally supporting themselves within their communities." 119 CONG. REC. 24,587-88 (1973); see also DuBow, *supra* note 34, at 1438 ("Section 504 is considered by handicapped people as the broadest protection of their rights").

For the pertinent history of the EHA, reflecting similar views of sponsors and aspirations by advocates, see Comment, *Beyond Conventional Education: A Definition of Education Under the Education For All Handicapped Children Act of 1975*, 48 LAW & CONTEMP. PROBS. 63, 67-71 (1985). See also Yohalem, *The Right to Education*, in 2 LEGAL RIGHTS, at 1093, 1096 (1979) (right of handicapped children to special education now "firmly established" as result of EHA).

95. The use of the "pendulum" metaphor has grown exponentially in recent months. See,

Court was not overtly hostile, it merely chose to "sidestep"⁹⁶ difficult decisions so as to avoid dealing with some of the issues raised by litigants. Thus, it was inevitable that advocates on behalf of this population would search for new bases for causes of action and new forums in which to bring such cases.

Two of the most important developments in this area have been the use of (1) state constitutions⁹⁷ and (2) state statutes—commonly called "Patients' Bills of Rights"⁹⁸—as the source of such rights. While comparatively little academic and scholarly attention has been paid to this phenomenon (which is still sufficiently diffused such that it cannot accurately be called a "movement"), its importance will grow immeasurably in the next decade. Since it is not realistic to expect that the Rehnquist Court will be any more favorably disposed to the idea of expanding the rights of the institutionalized mentally disabled than the Burger Court,⁹⁹

e.g., Durham and La Fond, *The Empirical Consequences and Policy Implications of Broadening the Statutory Criteria for Civil Commitment*, 3 YALE L. & POL'Y REV. 395, 398 (1985) ("the pendulum of public attitudes and state policy is swinging again"); Myers, *Involuntary Civil Commitment of the Mentally Ill: A System in Need of Change*, 29 VILL. L. REV. 367, 379 (1983-84) ("the pendulum may have swung too far"); Shuman, *Innovative Statutory Approaches to Civil Commitment: An Overview and Critique*, 13 LAW, MED. & HEALTH CARE 284, 286 (1985) ("Now, it appears, the swing toward dangerousness as an all exclusive criterion for commitment of the mentally ill has reached the height of its arc and has begun to reverse direction.").

96. *See, e.g.*, Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1230 n.7 (7th Cir. 1980) (Court "side-stepped" the issue of existence of private right of action under § 504 in Southeastern Community College v. Davis, 442 U.S. 397, 404-05 n.5 (1979)); *see also* Wexler, *Seclusion and Restraint: Lessons from Law, Psychiatry, and Psychology*, 5 INT'L J.L. & PSYCHIATRY 285, 290 (1982) (Court "skirted" question of right to refuse treatment in *Mills*); Note, O'Connor v. Donaldson: *The Supreme Court Sidesteps the Right to Treatment*, 13 CAL. W.L. REV. 168 (1976); Comment, *supra* note 23, at 564-65 (Court "sidestepped" constitutional right to treatment arguments in *O'Connor*). *But see* Darrone, 465 U.S. at 690 n.7 (existence of private cause of action under § 504 conceded by defendants).

97. *See infra* text accompanying notes 100-319.

98. *See infra* text accompanying notes 320-601.

This Article will omit, due to time and space limitations, discussion on such state statutes that parallel § 504 in barring employment discrimination. *See, e.g.*, Note, *From Wanderers to Workers: A Survey of Federal and State Employment Rights of the Mentally Ill*, 45 LAW & CONTEMP. PROBS. 41 (Summer 1982). This Article also does not discuss state statutes that parallel the EHA in mandating special education services for handicapped children. *See generally* S. BRAKEL, J. PARRY & B. WEINER, *THE MENTALLY DISABLED AND THE LAW* 630-48 (1985).

99. Chief Justice Burger's well-documented interest in mental disability law has been characterized by a certain amount of ambivalence. *See, e.g.*, Addington v. Texas, 441 U.S. 418 (1979) (establishing burden of "clear and convincing evidence" as standard of proof in involuntary civil commitment proceeding, rejecting both "preponderance" standard and "beyond a reasonable doubt" quantum); *see also* Burger, *Psychiatrists, Lawyers and the Courts*, 28 FED. PROBATION 3, 6 (June 1964); Delgado, "Concurrence" in *Quotes: A Critical Assessment of*

the use of state constitutions and state statutes in state courts may be the last frontier for the mentally disabled.

Chief Justice Burger's Objections to a Right to Treatment for the Involuntarily Confined Mentally Ill, 15 U.C. DAVIS L. REV. 527 (1982); Perlin, *supra* note 75.

Chief Justice Burger's concurring opinions in *O'Connor* and *Youngberg* underscore his antipathy to the declaration of a substantive constitutional right to treatment. *O'Connor*, 422 U.S. at 578 (Burger, C.J., concurring); *Youngberg*, 457 U.S. at 329 (Burger, C.J., concurring). His majority opinion in *Parham* has been criticized for ignoring "[t]he physical conditions, isolation and dangers of day-to-day life in institutions." Ferleger, *Special Problems in the Commitment of Children*, in 1 LEGAL RIGHTS, at 397, 404 (1979). Nonetheless, his *O'Connor* concurrence also helped firmly establish the application of procedural due process standards to the civil commitment process. See, e.g., *In re S.L.*, 94 N.J. 128, 137, 462 A.2d 1252, 1256 (1983) (establishing placement review hearings for patients discharged pending placement); Perlin, "Discharged Pending Placement": *The Due Process Rights of the Nondangerous Institutionalized Mentally Handicapped With "Nowhere to Go,"* Directions in Psychiatry (Watherleigh Co.) vol. 5, lesson 21 (1985). Because commitment "effects a great restraint on individual liberty, this power of the State is constitutionally bounded." *O'Connor*, 422 U.S. at 580 (Burger, C.J., concurring). Furthermore, Chief Justice Burger's majority opinion in *Estelle v. Smith*, 451 U.S. 454 (1981), established for the first time that admitting into evidence—at the penalty phase of a capital punishment trial—testimony of a "neutral" psychiatrist who had examined a defendant to determine his competency to stand trial violated the fifth and sixth amendments. *Id.* at 461-71. But see *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring) (urging limitation on Court's decision to capital cases); see also *supra* text accompanying notes 82-84.

His preoccupations—perhaps a reflection of his lengthy battles with Judge Bazelon when they served on the District of Columbia Court of Appeals—also reflect his ambivalence about the role of psychiatry in the mental health process. See Perlin, *supra* note 75, at 168 & n.502; see also *Addington*, 441 U.S. at 429 (rejecting beyond a reasonable doubt standard, in part, because "[g]iven the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous"); *O'Connor*, 422 U.S. at 584 (Burger, C.J., concurring) ("There can be little responsible debate regarding 'the uncertainty of diagnosis in this field and the tentativeness of professional judgment.'") (quoting *Greenwood v. United States*, 350 U.S. 366, 375 (1956)). But see Delgado, *supra*, at 543-45 (as a result of subsequent and more contemporaneous medical developments, the former Chief Justice's uncertainty-of-diagnosis argument has "lost much of its original force").

On the other hand, Chief Justice Rehnquist's record reflects only hostility to cases brought on behalf of the mentally disabled, especially—but not exclusively—in the context of a criminal trial. In *Estelle*, he concurred on the grounds that defendant's counsel should have been notified of the psychiatric examination in question, adding that he was "not convinced" that any fifth amendment rights were implicated. 451 U.S. at 474-75 (Rehnquist, J., concurring). He dissented in *Ake*, suggesting that: (1) the Court's rule should be limited to capital cases, and (2) "the entitlement is to an independent psychiatric evaluation, not to a defense consultant." 470 U.S. at 87 (Rehnquist, J., dissenting).

Justice Rehnquist's opinion for the Court in *Allen v. Illinois*, 106 S. Ct. 2988 (1986), held that proceedings under Illinois' Sexually Dangerous Persons Act were not "criminal," thus making inapplicable the fifth amendment's privilege against self-incrimination, notwithstanding the fact that sex offenders were committed to maximum security institutions also housing convicts in need of psychiatric care. And, as indicated above, his opinion for the Court in *Pennhurst I* held that certain bill of rights sections of the Developmentally Disordered Assistance and Bill of Rights Act (DD Act) did not create any substantive rights to "appropriate

This paper will first examine the historical background of state constitutional developments (Part IIA), and will then review the various methodologies employed in construing state constitutional provisions (Part IIB). Next, it will examine the expanding role of state constitutions as a specific source of rights for the mentally disabled (Part IIC).

It will then consider the traditional role of state statutes in governing treatment of the mentally disabled (Parts IIIA and B), examine the significance of the *Wyatt v. Stickney* case and the report of the President's Commission on Mental Health in relation to subsequent statutory developments (Parts IIIC and D), and will finally consider the expanding role of these statutes as a parallel source of rights of the same population (Parts IIIE and F).

II. STATE CONSTITUTIONS

A. Historical Background

Although the emergence of state constitutional law as a scholarly topic worthy of serious scrutiny by judges,¹⁰⁰ academics,¹⁰¹ and practi-

treatment" in the "least restrictive" environment for mentally retarded individuals. *Estelle*, 451 U.S. at 29; see *supra* text accompanying notes 85-87.

In two cases, Chief Justice Burger joined separate opinions written by Justice Rehnquist. In *Wainwright v. Greenfield*, 106 S. Ct. 634 (1986), the majority ruled that the use of a criminal defendant's post-arrest, post-*Miranda* warnings silence, as evidence to prove his sanity, violated due process. *Id.* at 638-41. Justice Rehnquist concurred, suggesting that a request for a lawyer "may be highly relevant where the plea is based on insanity." *Id.* at 642 (Rehnquist, J., concurring). In *Ford v. Wainwright*, 106 S. Ct. 2595 (1986), Justice Rehnquist dissented squarely, arguing that the eighth amendment does not create a substantive right not to be executed while insane. *Id.* at 2613 (Rehnquist, J., dissenting).

100. See, e.g., Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980); Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985) [hereinafter Mosk I]; Mosk, *Whither Thou Goest—The State Constitution and Election Returns*, 7 WHITTIER L. REV. 753 (1985) [hereinafter Mosk II]; Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983) [hereinafter Pollock I]; Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985) [hereinafter Pollock II]; Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985); Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165 (1984). Justice Brennan's article has been called the Magna Carta of state constitutional law. Pollock I, *supra*, at 716.

101. See, e.g., Collins, *Reliance on State Constitutions—Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731 (1982); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Welsh, *Whose Federalism? — The Burger Court's Treatment of State Civil Liberties Judgments*, 10

tioners¹⁰² is a relatively recent phenomenon,¹⁰³ California Supreme Court Justice Stanley Mosk¹⁰⁴ has stressed that "[w]hen the Founding Fathers put this one nation together, they recognized the primacy of the states in protecting individual rights."¹⁰⁵

Before 1776,¹⁰⁶ various colonies of the New World guaranteed their citizens freedom of religion,¹⁰⁷ freedom of the press,¹⁰⁸ freedom of

HASTINGS CONST. L.Q. 819 (1983); Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985) [hereinafter Williams I].

Not all commentators have been so favorable. See, e.g., Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985).

102. See, e.g., RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (P. Bamberger ed. 1985) [hereinafter RECENT DEVELOPMENTS].

103. Historians have traditionally studied the issues involved. See, e.g., F. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES 1776-1860, 52-56 (1930). The first major law review article on the topic, however, did not appear until 1951. See Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620 (1951). There was minimal academic interest in this topic in the 1960's. See, e.g., Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125 (1969); Graves, *State Constitutional Law: A Twenty-five Year Summary*, 8 WM. & MARY L. REV. 1 (1966); see also Collins, *supra* note 101, at 4 n.11 (characterizing Paulsen's article as "far too often overlooked," and Force's as "valuable but forgotten"). But it was not until the early 1970's, perhaps not coincidentally, the time of the emergence of the Burger Court, that academic scholarship began to flourish. See, e.g., Howard, *supra* note 101, at 874-79; Ludlow, *Recent Developments in the New Federalism*, in RECENT DEVELOPMENTS, *supra* note 102, at 405, 479-83 (listing articles); Linde, *supra* note 100, at 396 n.70 (same); Note, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1328-29 n.20 (1982).

For an early compilation of state constitutions, see W. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS (1973); F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (1909).

104. See Mosk I, *supra* note 100; Mosk II, *supra* note 100; see also Mosk, *Contemporary Federalism*, 9 PAC. L.J. 711 (1978) [hereinafter Mosk III].

105. Mosk I, *supra* note 100, at 1082 (footnote omitted). Madison wrote:

The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people and the internal order, improvement, and prosperity of the state.

THE FEDERALIST No. 45, at 319 (J. Madison) (E. Bourne ed. 1947). See generally C. BLOCH, STATES' RIGHTS: THE LAW OF THE LAND (1958).

106. In 1641, the Massachusetts Body of Liberties prohibited double jeopardy. See MASS. BODY OF LIBERTIES § 42 (1641), reprinted in SOURCES OF OUR LIBERTIES 153 (R. Perry ed. 1978); see also 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971).

107. CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1663), reprinted in SOURCES OF OUR LIBERTIES, *supra* note 106, at 169, 170.

108. VA. CONST. § 12 (1776), reprinted in SOURCES OF OUR LIBERTIES, *supra* note 106, at 312.

speech,¹⁰⁹ and prohibited ex post facto laws¹¹⁰ and peacetime quartering of soldiers.¹¹¹ For example, the North Carolina Declaration of Rights adopted in 1776 included

a compendium of most of the fundamental rights which had come to be recognized by American Constitution-makers: trial by jury, right to accusation and confrontation, privilege against self-incrimination, right against excessive bail or fines, cruel and unusual punishment, and general warrants, that not to be deprived of life, liberty, or property "but by the law of the land," freedom of the press, right to bear arms, freedom of conscience, and prohibition of ex post facto laws.¹¹²

These provisions were an outgrowth of the colonists' pre-Revolutionary War distrust of Parliament,¹¹³ and served as "limitations imposed by the sovereign people on *all* branches of government, including the legislature."¹¹⁴ The "catalogue of civil liberties"¹¹⁵ in the pre-independence documents reflected "the beginning of the American constitutional doctrine of equality in fundamental law."¹¹⁶

Significantly, during the months preceding American independence, the idea of preparing uniform state constitutions was considered and rejected.¹¹⁷ As a result, while many of the documents incorporated provi-

109. PA. CONST. art. XII (1776), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 106, at 330.

110. DEL. DECLARATION OF RIGHTS § 11 (1776), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 106, at 339.

111. *Id.* § 21.

112. 1 B. SCHWARTZ, *supra* note 106, at 286.

113. Note, *supra* note 103, at 1326.

114. *Id.* at 1326 (emphasis added).

115. Linde, *supra* note 100, at 381.

116. Williams, *Equality in State Constitutional Law*, in RECENT DEVELOPMENTS, *supra* note 102, at 71-72 (footnote omitted) [hereinafter Williams II]; *see also* Williams I, *supra* note 101, at 1195-1203. Professor Williams noted that:

As the colonies moved toward a revolutionary posture, equality became a key element of political rhetoric.

"Between 1763 and 1776 the political leadership in the colonies adopted the postulate of equality as part of its active vocabulary because it provided the most effective argument for justifying resistance to colonial rule."

Williams II, *supra*, at 72 (quoting John Adams); *see also* J. BAER, EQUALITY UNDER THE CONSTITUTION 38-56 (1983); Howard, "For the Common Benefit": Constitutional History in Virginia As A Casebook for the Modern Constitution-Maker, 54 VA. L. REV. 816, 823 (1968). The broad equality provisions in the Virginia Bill of Rights are owed "to the teachings of natural law, rather than to the dictates of the British Constitution." Howard, *supra*, at 823-24; *see also* VA. CONST. § 1 (1776), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 106, at 311.

117. Linde, *supra* note 100, at 381. *See generally* F. GREEN, *supra* note 103, at 52-56.

sions such as those in the North Carolina enactment¹¹⁸ and Maryland's Declaration of Rights,¹¹⁹ the early state charters and constitutions were a remarkably diverse group of documents¹²⁰ through which the colonists could "reject English political thought and . . . elaborate a new principle of political legitimacy."¹²¹

These state guarantees appeared so secure—and the powers of the prospective federal government so confined—"that a federal bill of rights was never seriously considered" at the 1787 Constitutional Convention.¹²² The federal Bill of Rights,¹²³ eventually added "to allay fears that the new *national* government might use its power to curtail individual liberties,"¹²⁴ was thought unnecessary as applied to the states "where governments were trusted local authorities within the control of the citizenry."¹²⁵

Thus, it was no surprise that the Supreme Court, in *Barron v. Baltimore*,¹²⁶ held that the federal Bill of Rights did not apply to the states.¹²⁷

118. See *supra* note 112.

119. See MD. CONST., DECLARATION OF RIGHTS arts. 19-20, 22-23, 38 (1776), reprinted in SOURCES OF OUR LIBERTIES, *supra* note 106, at 346-51.

120. Pollock II, *supra* note 100, at 978; see also *id.* at 979 (lauding system's "vibrant diversity"). According to Justice Pollock, Justice Brandeis' famous version of the "single courageous State . . . as a laboratory [which can] try novel social and economic experiments without risk to the rest of the country," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), stems from this historical diversity. Pollock II, *supra* note 100, at 978 n.8; see also Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985).

121. Note, *supra* note 103, at 1326.

122. *Id.* at 1327.

123. According to Professor Wood, James Madison introduced a federal bill of rights in the first Congress "primarily to quiet opponents of the federal Constitution." G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 542 (1969). It has been argued that the amendments eventually adopted in the Bill of Rights "represented a simplified list of state rights and did not claim to provide any greater or lesser degree of protection." Note, *supra* note 103, at 1327; see Brennan, *supra* note 100, at 501 ("Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal bill of rights previously had been protected in one or more state constitutions."). See generally Brennan, *The Bill of Rights and the States*, in THE GREAT RIGHTS 65 (E. Cahn ed. 1963).

124. Mosk I, *supra* note 100, at 1083 (emphasis added); see also Linde, *supra* note 100, at 381.

125. Mosk I, *supra* note 100, at 1083. See generally C. BLOCH, *supra* note 105. Interestingly, the states that promulgated new constitutions after the enactment of the federal bill of rights often took *their* bills of rights from preexisting state constitutions rather than from the federal amendments. Linde, *supra* note 100, at 381; see also Swindler, *State Constitutional Law: Some Representative Decisions*, 9 WM. & MARY L. REV. 166, 173 (1967) ("Historically, new states in the westward movement of the nation borrowed in whole or in part from the constitutions of older states in preparing their first constitutions.").

126. 32 U.S. (7 Pet.) 243 (1833) (Marshall, C.J.).

127. *Id.* at 250-51.

As Chief Justice Marshall pointed out, the adoption of the fifth amendment "could never have occurred to any human being as a mode of doing that which might be effected by the state itself."¹²⁸

From the time of *Marbury v. Madison*¹²⁹ and other early decisions upholding the power of the Supreme Court,¹³⁰ "there was a relentless tide of authority flowing from the states to the federal government."¹³¹ While the Bill of Rights was rarely litigated in the first half of the nineteenth century,¹³² ratification of the fourteenth amendment and the subsequent use of the incorporation doctrine to make selected Bill of Rights guarantees apply to the states¹³³ "obscured the functional independence of the original state and federal guarantees."¹³⁴

This movement reached its zenith during the Warren Court years¹³⁵ when, according to Professor Howard, it became "easy for state courts . . . to fall into the drowsy habit of looking no further than federal constitutional law."¹³⁶ As a result, and because of the states' "dismal record of

128. *Id.*; cf. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (assuming that the fourteenth amendment incorporated first amendment rights as to the states); *Stromberg v. California*, 283 U.S. 359, 368 (1931) (applying *Gitlow* as reflecting incorporation doctrine).

129. 5 U.S. (1 Cranch) 137 (1803). It should be noted, however, that two decades before *Marbury* was decided, the Virginia Court of Appeals found that it had the power to declare a state law unconstitutional and that at least three state courts—in New Hampshire, North Carolina and Rhode Island—did so prior to the drafting of the federal Constitution. See *Commonwealth v. Caton*, 8 Va. 5, 8 (1782); Howard, *supra* note 101, at 877 n.20.

130. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

131. Mosk I, *supra* note 100, at 1084.

132. Note, *supra* note 103, at 1327.

On the other hand, Third Circuit Court of Appeals Judge John J. Gibbons has studied the period between 1790 and 1860 to review the then common practice of relegating the litigation of federal issues to state courts, and has concluded that this practice resulted in a "consistent failure of implementation of federal governmental policy." Gibbons, *Federal Law and the State Courts: 1790-1860*, 36 RUTGERS L. REV. 399, 402 (1984). According to Judge Gibbons, "[this] experience . . . teaches us that [dual sovereignty] will not work as a legal system unless the national government undertakes to have its own courts in place . . . providing prompt and effective enforcement or relief under the national laws." *Id.* at 452.

133. For a survey of cases, see Countryman, *Why A State Bill of Rights?*, 45 WASH. L. REV. 454, 456-66 (1970).

134. Note, *supra* note 103, at 1328.

135. According to Justice Brennan:

It was in the years from 1962 to 1969 that the face of the law changed. Those years witnessed the extension to the states of nine of the specifics of the Bill of Rights; decisions which have had a profound impact on American life, requiring the deep involvement of state courts in the application of federal law.

Brennan, *supra* note 100, at 493. See Ludlow, *supra* note 103, at 410-11, for a list of pertinent decisions.

136. Howard, *supra* note 101, at 878. According to Justice Brennan, "it was only natural that when during the 1960's our rights and liberties were in the process of becoming increas-

employing their state constitutions,"¹³⁷ the question was raised by respected commentators as to whether state bills of rights "still served a worthwhile purpose."¹³⁸

Although the controversy rages as to whether or not the Burger Court has been a "revolutionary" one in its approach to constitutional litigation,¹³⁹ there can be little disputing that the Supreme Court's last decade has been "marked most profoundly by a retrenchment of individual rights, particularly Fourth, Fifth and Sixth amendment federal constitutional guarantees to those accused of criminal offenses."¹⁴⁰

As a result of this "retrenchment,"¹⁴¹ litigants were soon urged to "employ their state constitutions to maintain decisional consistency,"¹⁴² a strategy which was paradoxically given support by *other* Burger Court

ingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions." Brennan, *supra* note 100, at 495.

137. Mosk I, *supra* note 100, at 1084.

138. Brennan, *supra* note 100, at 495.

Professor Countryman answers his rhetorical question of whether "there is any real need for a Bill of Rights in a state constitution":

No state, even if it were otherwise willing to abdicate the function of protecting individual liberty entirely to the federal government, should today be willing to do so for at least three reasons: (1) Many of the Supreme Court's interpretations of federal constitutional guarantees applicable to the states are not clearly acceptable today, much less for the indefinite future. (2) Not all of the federal constitutional guarantees have been held applicable to the states. (3) Modern society is entitled to expect additional guarantees not to be found in the Constitution of the United States.

Countryman, *supra* note 133, at 456.

139. See THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi ed. 1983); Nichol, *An Activism of Ambivalence*, 98 HARV. L. REV. 315, 317 (1984) (Book Review) ("in short, the majority verdict is that the Burger Court is not so bad"); see also *id.* at 325 n.4 (discussing other reviews). For a collection of recent articles discussing the Court's record, see Goodwin, *supra* note 93, at 267 n.2. For a much earlier analysis, see Abraham, *Of Myths, Motives, Motivations, and Morality: Some Observations on the Burger Court's Record on Civil Rights and Liberties*, 52 NOTRE DAME L. REV. 77 (1976).

For a recent exchange on this issue, compare Schmidt, *The Rehnquist Court: A Watershed*, N.Y. Times, June 22, 1986, § 4, at 27, col. 2, with Fiss, *Charting the Supreme Court's Conservative Drift*, N.Y. Times, June 29, 1986, § 4, at 22, col. 3.

140. Greenhalgh, *Independent and Adequate State Grounds: The Long and the Short of It*, in RECENT DEVELOPMENTS, *supra* note 102, at 15, 17 [hereinafter Greenhalgh I]; see also Howard, *supra* note 101, at 874 (While the Burger Court has not been the "wrecking crew that some thought it would be," in many areas of the law "the difference between where we are today and where we were at the close of the Warren era is marked and inescapable.").

141. More neutrally, New Jersey Supreme Court Justice Stewart Pollock characterizes federal constitutional law as having "changed direction." Pollock II, *supra* note 100, at 979.

142. Mosk I, *supra* note 100, at 1088; see, e.g., *Michigan v. Mosley*, 423 U.S. 96, 111-21 (1975) (Brennan, J., dissenting) (reminding states that they could bestow on their citizens more rights than compelled by the federal Constitution); Brennan, *supra* note 100, at 502 ("[A]lthough in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.").

cases clarifying that a state was free, as a matter of its own law, to adopt "individual liberties more expansive than those conferred by the Federal Constitution."¹⁴³ Justice Brennan, for one, saw this strategy as a means of precluding Supreme Court review,¹⁴⁴ as that Court's jurisdiction was traditionally limited to the correction of errors related solely to questions of federal law.¹⁴⁵

143. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980); see also *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967). For a list of relevant cases, see *State v. Schmid*, 84 N.J. 535, 553-54, 423 A.2d 615, 624-25 (1980), *appeal dismissed sub nom. Princeton Univ. v. Schmid*, 455 U.S. 100 (1982).

144. See Brennan, *supra* note 100, at 501 (discussing *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *cert. denied and appeal dismissed*, 423 U.S. 808 (1975) (invalidating municipality's exclusionary zoning ordinance)); see also Ludlow, *supra* note 103, at 414 ("The state court method of state constitutional reliance insulates decisions from federal judicial review."). According to Justice Mosk, "[t]he use of state constitutions is no sport designed to thwart federal review, although that is a salutary by-product." Mosk III, *supra* note 104, at 721 (1978); see also Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 Ky. L.J. 421 (1974).

145. See, e.g., *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875); Brennan, *supra* note 100, at 501 n.80.

At the same time, commentators began to question the assumption—articulated by the Supreme Court in cases such as *Stone v. Powell*, 428 U.S. 465 (1976)—that state and federal courts were equally competent and functionally interchangeable forums for the enforcement of federal constitutional rights. Such an assumption of parity, Professor Neuborne charged, was a "dangerous myth," providing a "pretext for funneling federal constitutional decisionmaking into state courts precisely because they are less likely to be receptive to vigorous enforcement of federal constitutional doctrine." Neuborne, *supra* note 33, at 1105-06. Professor Redish has echoed the same views:

It would be unreasonable to expect state judiciaries to possess a facility equal to that of the federal courts in adjudicating federal law. Moreover, because federal judges are guaranteed the independence protections of Article III, while many state judges are forced to stand for election, we can generally be assured of a greater degree of independence of the federal judiciary from external political forces.

REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 2-3 (1980) (footnotes omitted); cf. Gibbons, *supra* note 132.

For a discussion of the theoretical impact of political concerns on judicial behavior, see Jacob, *Judicial Insulation—Elections, Direct Participation, and Public Attention to the Courts in Wisconsin*, 1966 WIS. L. REV. 801. It may not be coincidental that three of the four states where state judges are appointed with life tenure—Massachusetts, Rhode Island, New Hampshire and New Jersey—have been classified as states where courts have "a reputation for sympathetic consideration of civil liberties claims" and where state constitutions are relied upon "to extend protections for individual rights . . . broader than those accorded by the Burger Court." Abrahamson, *supra* note 120, at 1181 n.162 (1985); (see Tarr & Porter, *Gender Equality and Judicial Federalism: The Role of State Appellate Courts*, 9 HASTINGS CONST. L.Q. 919 (1982)); Neuborne, *supra* note 33, at 1127 n.81; see also *id.* at 1116 n.45 ("While the evidence is far from conclusive, it is from among those appellate courts which closely approximate the independence enjoyed by the federal courts that one finds the state courts which have been most vigorous in protecting individual rights"). See generally S. ESCOVITZ, *JUDICIAL SELECTION AND TENURE* 17-42 (1975).

Professor Welsh has recently written that this "conventional portrait of state judges as

In *Michigan v. Long*,¹⁴⁶ however, the Supreme Court announced that it will "merely assume that there are no [adequate and independent] grounds [so as to defeat federal jurisdiction] when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law."¹⁴⁷ As a result of *Long* and its progeny,¹⁴⁸ a state court must make a "plain statement" that it cited to or discussed federal law for guidance only.¹⁴⁹

According to Professor Greenhalgh, the Court since *Long* has assumed a presumption of dependence on federal law in cases where state courts have protected the rights of their citizens under state law . . . [going] out of its way to find that rights granted under state constitutional provisions, which are certainly adequate to support state court judgments, have not been granted "independent" of an interpretation of federal law.¹⁵⁰

personally unsympathetic toward and institutionally incapable of vindicating individual rights no longer depicts current realities." Welsh, *supra* note 101, at 875.

146. 463 U.S. 1032 (1983). See generally Note, *The Use of State Constitutional Provisions in Criminal Defense After Michigan v. Long*, 65 NEB. L. REV. 605 (1986).

147. *Long*, 463 U.S. at 1042.

148. *Long's* progeny is discussed fully in Bamberger, *Methodology for Raising State Constitutional Issues*, in RECENT DEVELOPMENTS, *supra* note 102, at 287, 294-301.

With our dual system of state and federal laws, administered by parallel state and federal courts, different standards may arise in various areas. But when state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state must be aware that they have the power to amend state law to ensure rational law enforcement.

Florida v. Casal, 462 U.S. 637, 638 (1983) (Burger, C.J., concurring) (*writ of certiorari* improvidently granted) (emphasis in original).

Concludes one student author: "The responsibility for the protection of individual rights is now primarily a function of the state courts and those who practice in them." Note, *supra* note 146, at 630.

149. *Long*, 463 U.S. at 1041. The New Hampshire Supreme Court has written: "We hereby make clear that when this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our results bound by those decisions." State v. Ball, 124 N.H. 226, 233, 471 A.2d 347, 352 (1983). The New Jersey Supreme Court noted:

Consonant with the United States Supreme Court's decision in *Michigan v. Long*, we expressly observe that our decision today rests, in part, upon state constitutional grounds independent of federal law. The federal cases that we cite in support of our interpretation of the New Jersey Constitution "are being used only for the purpose of guidance, and do not themselves compel the result that [this Court] has reached."

State v. Bruzzese, 94 N.J. 210, 217 n.3, 463 A.2d 320, 324 n.3 (1983) (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (citation omitted)).

150. Greenhalgh I, *supra* note 140, at 22; see also *Massachusetts v. Upton*, 466 U.S. 727 (1984) ("bobbing"); *Florida v. Myers*, 466 U.S. 380 (1984) ("weaving"); *Colorado v. Nunez*, 465 U.S. 324 (1984) (characterizing recent post-*Long* decisions as "ducking"); Greenhalgh, *Independent and Adequate State Grounds in Criminal Law and Procedure: Supreme Court*

Justice Pollock, who has subsequently characterized the adequate and independent state ground requirement as the "most critical question [facing the United States Supreme Court] in the near future," sees the lesson of the *Long* line of cases to be that "[s]tate court judges must become at least as familiar with their state constitution as they are with the federal constitution."¹⁵¹ Over a decade ago, Professor Howard concluded his exhaustive study¹⁵² with a parallel thought:

[T]he coming of the Burger Court offers an appropriate time for state courts to reflect on their ancient heritage as interpreters of their state charters of liberty and on the ever growing opportunities to look at those documents to vindicate the rights of the people of the several states. George Mason and the framers of Virginia's 1776 Declaration of Rights called for a "frequent recurrence to fundamental principles." It is in that spirit that successive generations of state judges breathe continued life into their states' constitutions.¹⁵³

B. State Constitutional Law Methodologies

Two questions must be considered in any case involving a state constitutional question: (1) Is the state constitutional question considered before, after, or simultaneously with the parallel federal constitutional question, and (2) How should a state judge textually approach a state constitutional question?

1. State and federal constitutional interplay

At least three separate modes of analyzing state constitutional claims have emerged.¹⁵⁴ First, some courts employ a "dual reliance" system¹⁵⁵ by which they find support for their decisions in both the state and the federal constitutions.¹⁵⁶ While Washington Supreme Court Jus-

Perspective (1983-1984), in RECENT DEVELOPMENTS, *supra* note 102, at 11-14 [hereinafter Greenhalgh II]. But see *People v. Van Bulow*, 475 A.2d 995 (R.I. 1984), *cert. denied*, 469 U.S. 875 (1985).

151. Pollock II, *supra* note 100, at 992.

152. Howard, *supra* note 101.

153. *Id.* at 943-44 (footnote omitted).

154. Pollock II, *supra* note 100, at 983-86; see also Pollock I, *supra* note 100, at 718-19.

155. See Deukmejian and Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 996-97 (1979).

156. See, e.g., *State v. Badger*, 141 Vt. 430, 450 A.2d 336 (1982); *State v. Coe*, 101 Wash. 2d 364, 679 P.2d 353 (1984). Second Circuit Court of Appeals Judge James L. Oakes has characterized *Badger* and other Vermont decisions as "a fine example for some of the other states, and indeed perhaps for the Supreme Court of the United States itself, of what the Bill of Rights really means, or should mean." Oakes, *State Courts in a Time of Federal Constitutional*

tice Robert F. Utter has praised this approach as "benefit[ing] both the state and federal judiciaries,"¹⁵⁷ *Michigan v. Long*¹⁵⁸ and its progeny¹⁵⁹ seemingly call into question the future vitality of this doctrine.

Second, other courts employ the "primacy" approach, by which a court looks first to its own state constitution in matters involving fundamental liberties, and where federal constitutional issues are considered only if it is found that the infringement in question is permitted under the state constitution.¹⁶⁰ According to Justice Pollock, this approach is "consistent with the proposition that state constitutions are the basic charters of individual liberties" and is consistent with "efficient judicial management."¹⁶¹

Third, under the "supplemental" or "interstitial" approach, a court looks first to the federal Constitution, and only consults the state constitution if the question is unclear under the federal Constitution or if the asserted violation of the litigant's rights is valid under that Constitution.¹⁶² Justice Pollock views this approach as "particularly useful . . . in cases involving more than one set of fundamental rights."¹⁶³

Change, in RECENT DEVELOPMENTS, *supra* note 102, at 377, 400. The *Badger* court was specific:

Although the Vermont and federal constitutions "have a common origin and a similar purpose," our constitution is not a mere reflection of the federal charter. Historically and textually, it differs from the United States Constitution. It predates the federal counterpart, as it extends back to Vermont's days as an independent republic. It is an independent authority, and Vermont's fundamental law.

Badger, 141 Vt. at 448-49, 450 A.2d at 347 (quoting *State v. Brean*, 136 Vt. 147, 151, 385 A.2d 1085, 1088 (1978) (citation omitted)).

157. Utter, *supra* note 100, at 1047.

158. *Michigan v. Long*, 463 U.S. 1032 (1983).

159. See *supra* text accompanying notes 146-51.

160. See, e.g., *Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123 (1981); *State v. Ball*, 124 N.H. 226, 471 A.2d 347 (1983); *State v. Cadman*, 476 A.2d 1148 (Me. 1984).

161. Pollock II, *supra* note 100, at 984.

162. See, e.g., *State v. Williams*, 93 N.J. 39, 459 A.2d 641 (1983).

163. Pollock II, *supra* note 100, at 984; see, e.g., *Green v. United States*, 355 U.S. 184, 193 (1957) (finding it "intolerable" to force criminal defendant to abandon a fourth amendment right in order to assert an independent fifth amendment guarantee); Perlin, *Another "Incredible Dilemma": Psychiatric Assistance and Self-Incrimination*, 1985-86 ABA PREVIEW OF UNITED STATES SUPREME COURT CASES, Mar. 14, 1987, No. 10, at 288; Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741 (1981). Justice Pollock concludes: "As a practical matter, it may be unimportant whether a court looks initially or secondarily to the state constitution as long as it knows what the state constitution means, understands what that constitution demands, and makes a plain statement that it is relying on the state constitution." Pollock, *supra* note 100, at 985. But see *Schmid*, 84 N.J. at 569, 575, 423 A.2d at 633, 636 (Pashman, J., concurring in part and dissenting in part) (criticizing majority for "gratuitously" deciding that criminal trespass conviction would be upheld under federal Constitution).

2. Textual analysis

Professor Howard has suggested that there are at least *seven* factors that a state court judge should consider in construing a question of state constitutional law.¹⁶⁴ First, the textual language of the document itself may justify a broader reading of the state constitution than the United States Supreme Court has given to its federal counterpart.¹⁶⁵ In some cases, a provision of the state constitution will contain "more sweeping" language than its federal counterpart;¹⁶⁶ in others, the state constitution will explicitly provide specific rights¹⁶⁷ in areas where there is no federal textual counterpart (e.g., education,¹⁶⁸ environment¹⁶⁹ and rights of the handicapped).¹⁷⁰

Second, even if the language is identical, legislative history, such as study commission reports and floor debates, may reveal an intention that will support reading a state provision differently than its federal counterpart.¹⁷¹ Even *absent* such interpretative tools, differing interpretations are possible; as the New Jersey Supreme Court has noted:

Even if the language of the state constitutional and federal constitutional provisions were identical, this Court could give differing interpretations to the provisions. . . . As Justice Mosk of the California Supreme Court has observed, "[i]t is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first

164. Howard, *supra* note 101, at 935-41.

165. *Id.* at 935.

166. See, e.g., *Schmid*, 84 N.J. at 556-60, 423 A.2d at 626-28 (discussing New Jersey's freedom of speech provision).

167. See Galie, *supra* note 101, at 734-35.

168. See N.J. CONST. art. VIII, § 4, ¶ 1.

169. See, e.g., MONT. CONST. art. II, § 3. For a fascinating analysis of litigation under the Montana state constitution, see Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095 (1985).

170. See, e.g., FLA. CONST. art. I, § 2; MONT. CONST. art. XII, § 3(2). Constitutional provisions are collected in Meisel, *The Rights of the Mentally Ill Under State Constitutions*, 45 LAW & CONTEMP. PROBS., at 7, 23 n.91 (Summer 1982).

This expanded specific articulation of rights is not always seen as entirely salutary: "Other rights range from the radical, like New Hampshire's recognition of a constitutional right to revolution, see N.H. CONST. pt. I, art. 10, to the ridiculous, like California's constitutional guarantee of a right to fish, see CAL. CONST. art. I, § 25." Galie, *supra* note 101, at 734 n.26.

171. Howard, *supra* note 101, at 936.

state constitutions, rather than the reverse."¹⁷²

Third, a state's history and traditions should be considered, in an effort to determine if the state constitutional provision was meant to reflect a "sense of local uniqueness."¹⁷³ Fourth, "[s]tate courts should consider the nature of the subject matter in litigation and the interests affected by the local political process."¹⁷⁴ As Professor Sager has pointed out:

It is not an accident that judges in New Jersey should have a distinct read on the application of principles of social justice to problems of municipal land use, [or] that judges in a large and diverse state like California should be moved first to curb inequities in the financing of public education¹⁷⁵

Fifth, state courts may consider whether the United States Supreme Court has demonstrated a "hands-off" attitude towards a particular clas-

172. *Schmid*, 84 N.J. at 557 n.8, 423 A.2d at 626 n.8 (quoting *People v. Brisendine*, 13 Cal. 3d 528, 550, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975)).

173. Howard, *supra* note 101, at 936-37. The most famous case in this line interpreted the Alaska state constitutional section guaranteeing a right of privacy, see ALASKA CONST. art. I, § 22, in light of the "character of life in Alaska," to give Alaskan citizens the right to possess and use marijuana in their own homes unless the state could show a substantial state interest in prohibiting such use. *Ravin v. State*, 537 P.2d 494, 502-04 (Alaska 1975). The court stressed:

Our territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in many of our sister states.

Id. at 504. *Ravin* is discussed in Howard, *supra* note 101, at 932-33. For other like examples, see, e.g., *State v. Sklar*, 317 A.2d 160 (Me. 1974) (jury trial for minor criminal offenses); *In re Advisory Opinion to the Senate*, 108 R.I. 628, 278 A.2d 852 (1971) (jury of twelve); *State ex rel. Weiss v. District Bd.*, 76 Wis. 177, 44 N.W. 967 (1890) (church/state separation); Howard, *supra* note 101, at 903-04.

174. Howard, *supra* note 101, at 937.

175. Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 975 (1985). Judge Pollock suggests:

[S]tate courts are a more appropriate forum than federal courts for defining a municipality's power to zone and its responsibility to provide a realistic opportunity for low and moderate income housing. State courts provide a preferred forum not because state judges are more sensitive to fundamental rights than are federal judges, but because state courts are not obligated to a national constituency in the same way as are federal courts. Furthermore, state courts can respond more readily to local conditions. As difficult as it may be to develop constitutional principles to govern the exercise of zoning power in a given state, how much more difficult it would be to define and enforce a single set of constitutional obligations to govern an entire nation.

Pollock I, *supra* note 100, at 717. *But see* Simon, *Independent But Inadequate: State Constitutions and Protections of Freedom of Expression*, 33 U. KAN. L. REV. 305-06 (1985) ("Unfortunately, in some ways, the movement toward the 'rebirth' of state constitutions has become a juggernaut and poses the same dangers as any movement with no destination.") (footnotes omitted); Maltz, *supra* note 101 (criticizing the state-by-state development of free expression law).

sification of problems,¹⁷⁶ as with substantive due process involving economic regulation.¹⁷⁷ Sixth, because state constitutions are amended "to reflect changing values"¹⁷⁸ more easily and frequently than their federal counterpart,¹⁷⁹ it can be argued that the state documents respond more contemporaneously to "the felt needs of each generation" and thus should be read in this context.¹⁸⁰

Finally, the "honored"¹⁸¹ tradition of the individual "courageous" state as the "laboratory" for "novel social and economic experiments"¹⁸² can be seen as a clarion cry for "innovation and diversity among state courts,"¹⁸³ notwithstanding the ambiguous relationship¹⁸⁴ between Justice Brandeis' "laboratory" vision and the Burger Court's embrace of a "new federalism"¹⁸⁵ in the aftermath of *Younger v. Harris*¹⁸⁶ and its progeny.

In addition to Professor Howard's arguments, other commentators have suggested one final justification for independent state constitutional analysis: the increasingly fractious and diffuse decision-making process of the Burger Court.¹⁸⁷ Oregon Supreme Court Justice Hans A. Linde¹⁸⁸ has noted pointedly: "A lot of Supreme Court decisions are no longer persuasive, but filled with fuzzy, soft terminology which has no cutting edge When the Court's doctrinal cogency and coherency begins to fall apart, we have state courts saying, in effect, 'We don't have to do it

176. Howard, *supra* note 101, at 938.

177. This area has been, in the words of Professor Galie, "well analyzed" by the commentators. Galie, *supra* note 101, at 774; *see also id.* n.276 (collecting authorities). For a full recent analysis of this area, see Malina, *Substantive Due Process—State Constitutional Protection in the Economic Area*, in RECENT DEVELOPMENTS, *supra* note 102, at 101.

178. Howard, *supra* note 101, at 939.

179. *See, e.g.,* Adrian, *Trends in State Constitutions*, 5 HARV. J. ON LEGIS. 311, 313-20 (1968); Graves, *supra* note 103.

180. Howard, *supra* note 101.

181. *Id.* at 940.

182. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also supra* note 21.

183. Howard, *supra* note 101, at 940.

184. *See* Welsh, *supra* note 101, at 875 ("The [United States Supreme] Court's insensitive approach to the demands of independent constitutional interpretation has resulted in the exercise of federal judicial review in a manner that thwarts the very innovative forces that the Black/Brandeis conception endeavors to protect.").

185. *See* Wright, *supra* note 100, at 182-83.

186. 401 U.S. 37 (1971). *See generally* WRIGHT, LAW OF FEDERAL COURTS § 52A, at 229-36 (3d ed. 1979). For an excellent recent analysis recommending abandonment of the *Younger* doctrine, *see* Zeigler, *Federal Court Reform of State Criminal Justice Systems: A Reassessment of the Younger Doctrine From a Modern Perspective*, 19 U.C. DAVIS L. REV. 31 (1985).

187. *Compare* *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (unanimous decision) *with* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (six opinions).

188. *See generally* Linde, *supra* note 100.

that way.' ”¹⁸⁹

In short, there can no longer be any doubt as to the importance of state constitutional doctrine in any question involving state regulation of civil liberties. It can only be expected that litigants representing the mentally disabled will turn more and more to state constitutional provisions in the future.¹⁹⁰

C. Rights Under State Constitutions

Four years ago, Professor Alan Meisel characterized state constitutions as a “virtually untapped source of rights” and perhaps “the most promising source of rights” for the mentally disabled in this decade.¹⁹¹ He surveyed then recent United States Supreme Court case law, including *O'Connor v. Donaldson*,¹⁹² *Parham v. J.R.*,¹⁹³ *Addington v. Texas*,¹⁹⁴ *Youngberg v. Romeo*,¹⁹⁵ and *Mills v. Rogers*.¹⁹⁶ Professor Meisel concluded that, as that Court could not “be relied upon to break new constitutional ground in securing rights to psychiatric patients on the civil side of the mental health system,”¹⁹⁷ the only “reliable sanctuary from Supreme Court review lies in the state courts’ ability to decide cases exclusively on the basis of state law.”¹⁹⁸

While Professor Meisel was able to find only a scattering of such cases¹⁹⁹ (some of which were ambiguous as to the source of declared rights),²⁰⁰ he characterized state constitutional law as “a much overlooked source of substantive rights for persons in the mental health system,”²⁰¹ and underscored that lawyers representing such persons “plainly have a duty to raise state law claims” in addition to federal

189. Margolick, *State Judiciaries Are Shaping Law That Goes Beyond Supreme Court*, N.Y. Times, May 19, 1982, at A1, col. 1, B8 col. 1.

190. See *infra* notes 191-206 and accompanying text.

191. Meisel, *supra* note 170, at 9.

192. 422 U.S. 563 (1975). See generally *supra* text accompanying notes 17-18.

193. 442 U.S. 584 (1979). See generally *supra* text accompanying note 50.

194. 441 U.S. 418 (1979). See generally *supra* text accompanying note 49.

195. 457 U.S. 307 (1982). See generally *supra* text accompanying notes 62, 64-66, 70.

196. 457 U.S. 291 (1982). See generally *infra* text accompanying notes 545-50.

197. Meisel, *supra* note 170, at 15.

198. *Id.* at 16; see also *Landmark*, *supra* note 93, at 149 (Because the Supreme Court’s decision in *Board of Education v. Rowley*, 458 U.S. 176 (1982), “may discourage plaintiffs from pursuing their federal rights concerning education for handicapped children, [it is suggested] that plaintiffs turn to state law to ensure an adequate education for handicapped children.”).

199. Meisel noted the significant methodological research difficulties in searching for and identifying all such cases. Meisel, *supra* note 170, at 24 n.94.

200. See, e.g., *id.* at 12 n.31 (discussing New Jersey cases).

201. *Id.* at 39-40.

claims.²⁰²

Although there has been no subsequent explosion of either state constitutional litigation or academic commentary²⁰³ in the intervening four years, a modest body of law has developed, especially in the area of the right to refuse treatment.²⁰⁴ Given the general scholarly and judicial impetus towards further state constitutional law developments,²⁰⁵ and given the Supreme Court's recent hostility towards institutional reform litigation,²⁰⁶ it seems likely that there will be further growth in this area.

1. Procedural rights in the civil commitment process

Several courts have considered the applicability of state constitutional provisions to the involuntary civil commitment process. In one of the earliest²⁰⁷ and broadest readings of any such state constitutional provision, the West Virginia Supreme Court of Appeals declared significant portions of that state's involuntary civil commitment statutes unconstitutional.²⁰⁸ The West Virginia court held that the statutes failed to provide both substantive due process limitations on the commitment power²⁰⁹ and procedural due process protections including the right to be present at the commitment hearing, the right to meaningful confrontation and cross-examination, and the right to a full transcript to guarantee meaningful judicial review.²¹⁰ To support its holdings, the court relied on both state and federal constitutional due process provisions,²¹¹ which it characterized as "the most advanced mechanisms for fairness which juridical science can create."²¹²

The Connecticut Supreme Court has read that state's constitution to mandate that involuntarily confined individuals receive periodic and continuing judicial reviews of the propriety of their commitment.²¹³ In the

202. *Id.* at 40.

203. The only survey done since Meisel's is Schwartz, *State Constitutional Due Process Rights?*, in RECENT DEVELOPMENTS, *supra* note 102, at 181, 196-201.

204. *See infra* notes 233-95 and accompanying text.

205. *See supra* notes 154-90 and accompanying text.

206. *See, e.g.,* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984). *See generally supra* notes 1-99 and accompanying text.

207. The decision by the West Virginia Supreme Judicial Court in *State ex rel. Hawks v. Lazaro*, 157 W. Va. 417, 202 S.E.2d 109 (1974), was issued at the height of what I refer to as the "golden age of federal litigation" on behalf of the mentally disabled.

208. W. VA. CODE § 27-5-2 (1931).

209. *Hawks*, 157 W. Va. at 422-36, 202 S.E.2d at 115-23.

210. *Id.* at 441-47, 202 S.E.2d at 125-28.

211. *Id.* at 435, 202 S.E.2d at 122 (citing U.S. CONST. amend. V, and W. VA. CONST. art. III, § 10 (1872)).

212. *Id.* at 426, 202 S.E.2d at 117.

213. *Fasulo v. Arafah*, 173 Conn. 473, 476-82, 378 A.2d 553, 555-57 (1977). *Fasulo* relied

subsequent words of the New Jersey Supreme Court, the Connecticut court "eloquently stated" the "compelling reasons" in support of its position:²¹⁴

Freedom from involuntary confinement for those who have committed no crime is the natural state of individuals in this country. The burden must be placed on the state to prove the necessity of stripping the citizen of one of his most fundamental rights, and the risk of error must rest on the state.²¹⁵

Similarly, the New York Court of Appeals relied on both state and federal constitutional provisions in ruling that basic procedural due process protections applied to the civil commitment process,²¹⁶ and that such commitment must be "therapeutic, not punitive."²¹⁷

Elsewhere, the Kentucky Court of Appeals interpreted its state constitutional provision guaranteeing the right to confrontation in criminal prosecutions²¹⁸ to apply equally to civil commitment hearings (there denominated "lunacy inquests"),²¹⁹ noting simply that the right was "also guaranteed by the Sixth Amendment."²²⁰

On the question of the right of a person facing civil commitment to a jury trial, courts have split in their interpretations of state constitutional provisions. The West Virginia Supreme Court of Appeals, after carefully examining the historical development of both the state constitution and the right to a trial by jury,²²¹ refused to read that state's constitutional due process provision²²² to so guarantee that right.²²³

on the due process guarantees of both the state constitution, CONN. CONST. art. 1, § 8, and on such constitutional decisions of the United States Supreme Court, as *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Jackson v. Indiana*, 406 U.S. 715 (1972).

214. *State v. Fields*, 77 N.J. 282, 300, 390 A.2d 574, 583 (1978).

215. *Fasulo*, 173 Conn. at 481, 378 A.2d at 557.

216. *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 166-67, 305 N.E.2d 903, 905-06, 350 N.Y.S.2d 889, 892-93 (1973).

217. *Id.* at 166, 305 N.E.2d at 905, 350 N.Y.S.2d at 892. The court relied on the New York state constitution which provides in pertinent part: "The care and treatment of persons suffering from mental disorder or defect and the protection of the mental health of the inhabitants of the state may be provided by state and local authorities and in such manner as the legislature may from time to time determine." N.Y. CONST. art. XVII, § 4.

218. KY. CONST. § 11.

219. *Denton v. Commonwealth*, 383 S.W.2d 681, 682 (Ky. 1964).

220. *Id.* at 683.

221. *Markey v. Wachtel*, 264 S.E.2d 437, 439-43 (W. Va. 1979).

222. W. VA. CONST. art. III, § 10.

223. *Markey*, 264 S.E.2d at 443. The court stressed that if the framers of the West Virginia Constitution had intended for the due process provision to provide for jury trials in all cases, there would have been no need for two *other* state constitutional provisions that mandated jury trials in "suits at common law" or in cases involving "crimes and misdemeanors." *Id.* at 441; *see also* W. VA. CONST. art. III, §§ 13, 14.

On the other hand, the Wisconsin Supreme Court found there was no justification under state or federal equal protection grounds²²⁴ in denying a jury trial under a subsequently repealed sex offender recommitment statute²²⁵ when such a trial was guaranteed by statute to persons facing involuntary civil commitment.²²⁶ And the California Supreme Court held that a person in peril of being declared "gravely disabled" pursuant to state law was entitled to a unanimous jury verdict in any such adjudication under the equal protection provisions of both the state and federal constitutions.²²⁷

In other cases, courts have relied on state constitutional provisions as a source of rights in construing other procedural aspects of the commitment process. The New Hampshire Supreme Court concluded that because of the "grievous loss" attendant upon an erroneous commitment decision, the state constitution²²⁸ mandated a burden of beyond a reasonable doubt at an involuntary commitment hearing,²²⁹ both as to determinations of mental illness and potential dangerousness.²³⁰ The California Supreme Court applied state constitutional law in holding that a statutory scheme permitting the indefinite placement in a state hospital of nonprotesting developmentally disabled adults violated both the equal protection and due process provisions of both the state and federal constitutions.²³¹ The court concluded:

224. *State ex rel. Farrell v. Stovall*, 59 Wis. 2d 148, 158-62, 207 N.W.2d 809, 813-15 (1973). The court noted that "[t]he United States and Wisconsin Constitutions are similar with respect to the due process and equal protection clauses." *Id.* at 158 n.20, 207 N.W.2d at 813 n.20.

225. For the chronology of the statute involved, see *State v. Combined Community Servs. Bd.*, 122 Wis. 2d 65, 87 n.12, 362 N.W.2d 104, 115 n.12 (1985).

226. *Farrell*, 59 Wis. 2d at 168-69, 207 N.W.2d at 815-19; see also *Community Servs. Bd.*, 122 Wis. 2d at 87-90, 362 N.W.2d at 114-16 (state and federal constitutions similar due process and equal protection provisions (citing *State ex rel. Farrell v. Stovall*, 59 Wis. 2d 148, 158 n.20, 207 N.W.2d 809, 813 n.20)).

227. *Conservatorship of Roulet*, 23 Cal. 3d 219, 231, 590 P.2d 1, 8, 152 Cal. Rptr. 425, 432 (1979).

228. See N.H. CONST. pt. 1, art. 15.

229. *Proctor v. Butler*, 117 N.H. 927, 934-35, 380 A.2d 673, 677-78 (1977).

230. *Id.* at 935, 380 A.2d at 677-78. Subsequently, that court relied on the state constitution to strike down a state statute which had created an irrebuttable presumption of dangerousness in cases involving recommitment of persons initially committed following a finding of not guilty by reason of insanity. See *State v. Robb*, 125 N.H. 581, 585-89, 484 A.2d 1130, 1132-35 (1984).

231. *In re Hop*, 29 Cal. 3d 82, 94, 623 P.2d 282, 288-89, 171 Cal. Rptr. 721, 727-28 (1983). The court stressed that state law providing that developmentally disabled persons " 'have the same legal rights and responsibilities guaranteed all other individuals by the Federal Constitution and laws and the Constitution and laws of the State of California' " is "but a legislative reaffirmation of a firmly rooted and independent constitutional principle which assures that persons will not be deprived of due process or equal protection of the law on the basis of developmental disability alone." *Id.* at 89, 623 P.2d at 286, 171 Cal. Rptr. at 725 (quoting

Neither the benevolent intent of the Legislature, nor of those involved in the care of the developmentally disabled, nor the force of the legislative directive mandating the least restrictive placements for the developmentally disabled . . . renders constitutional the legislative scheme which denies them the procedural safeguards of a hearing which is uniformly extended to other potential wards.²³²

2. The right to refuse treatment

While most of the case law²³³ and scholarly and academic attention²³⁴ paid to the scope of the right to refuse treatment has focused on the application of the federal Constitution,²³⁵ several courts have found a state constitutional right to refuse treatment.²³⁶ Most recently, the New York Court of Appeals has issued what appears to be the broadest right to refuse treatment opinion yet decided by an appellate court, and the broadest opinion decided by *any* court on the topic since the Third Circuit's remand opinion in *Rennie v. Klein*.²³⁷ In *Rivers v. Katz*,²³⁸ New

CAL. WELF. & INST. CODE § 4502 (West 1984)). The court cited prior cases decided under the California Constitution, holding that "'personal liberty is a fundamental interest, second only to life itself.'" *Id.* (quoting *People v. Olivas*, 17 Cal. 3d 236, 251, 551 P.2d 375, 384, 131 Cal. Rptr. 55, 64 (1976)).

232. *Id.* at 93, 623 P.2d at 289, 171 Cal. Rptr. at 728 (citation omitted).

233. See, e.g., *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), *modified*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub. nom. Mills v. Rogers*, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984); *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978), 476 F. Supp. 1294 (D.N.J. 1979) (supplemental opinion), *modified and remanded*, 653 F.2d 836 (3d Cir. 1981), *vacated and remanded*, 458 U.S. 1119 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983).

234. See, e.g., Brooks, *The Constitutional Right to Refuse Antipsychotic Medication*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 179 (1980); Gelman, *Mental Hospital Drugs, Professionalism and the Constitution*, 72 GEO. L.J. 1725 (1984); Rhoden, *The Right to Refuse Psychotropic Drugs*, 15 HARV. C.R.-C.L. L. REV. 363 (1980); see also Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U.L. REV. 461 (1977). See generally REFUSING TREATMENT IN MENTAL HEALTH INSTITUTIONS (Doudera & Swazey 1979) [hereinafter REFUSING TREATMENT]. But see Kemna, *Current Status of Institutionalized Mental Health Patients' Right to Refuse Psychotropic Drugs*, 6 J. LEGAL MED. 107 (1985) (surveying state decisions).

235. In addition to the constitutional theories ultimately relied upon in *Rennie* and *Rogers*, see *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976) (articulating alternative constitutional theories). For consideration of common-law theories in support of the right to refuse treatment, see Plotkin, *supra* note 234, at 485-90; Note, *A Common Law Remedy for Forcible Medication of the Institutionalized Mentally Ill*, 82 COLUM. L. REV. 1720 (1982).

236. See *infra* text accompanying notes 238-95. This material is adapted, in large part, from Perlin, *supra* note 72.

237. 720 F.2d 266 (3d Cir. 1983).

238. 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986). On July 10, 1986, defend-

York's highest state court ordered, in most cases,²³⁹ a *judicial* "determination of whether the patient has the capacity to make a reasoned decision with respect to proposed treatment before the drugs may be administered pursuant to the State's *parens patriae* power."²⁴⁰ The *Rivers* court based its decision solely upon state constitutional and common law grounds,²⁴¹ involving (1) a broader class of drugs than any prior opinion,²⁴² and (2) a regulatory scheme already approved in large part on *federal* constitutional grounds by the second circuit.²⁴³

Rivers was a consolidated action brought on behalf of three²⁴⁴ involuntarily²⁴⁵ committed patients at Harlem Valley Psychiatric Center²⁴⁶ who attempted²⁴⁷ to refuse the administration of certain antipsychotic

ants moved for a rehearing; at the time of the writing of this article, there was no decision by the court of appeals on that motion.

239. Where a patient presents a danger to self or others or

engages in dangerous or potentially destructive conduct within the institution, the state may be warranted, in the exercise of its police power, in administering antipsychotic medication over the patient's objections. The most obvious example of this is an emergency situation, such as when there is imminent danger to a patient or others in the immediate vicinity.

Id. at 495-96, 495 N.E.2d at 343, 504 N.Y.S.2d at 80 (citation omitted).

240. *Id.* at 497, 495 N.E.2d at 344, 504 N.Y.S.2d at 81 (emphasis added).

241. *Id.* at 492-95, 495 N.E.2d at 341-42, 504 N.Y.S.2d at 78-79.

242. *Rivers* appears to be the first case involving a patient complaining about the administration of lithium. *Id.* at 491, 495 N.E.2d at 340, 504 N.Y.S.2d at 77; *cf. Mills*, 457 U.S. at 293 n.1 (adopting classification used by First Circuit in *Rogers*); *Rennie*, 653 F.2d at 839 n.2 ("drugs such as lithium are not considered here"); *Rogers*, 634 F.2d at 653 n.1 (case exclusively concerned with antipsychotic drugs such as Thorazine, Mellaril, Prolixin, and Haldol; drugs such as lithium not covered); *Price v. Sheppard*, 307 Minn. 250, 262-63, 239 N.W.2d 905, 913 (1976) (While procedural due process hearing required prior to the imposition of electroshock therapy or other "more intrusive forms of treatment," such procedures "[c]ertainly [are] not intended to apply to the use of mild tranquilizers or those therapies requiring the cooperation of the patient.").

243. See *Project Release v. Prevost*, 722 F.2d 960, 979-81 (2d Cir. 1983), discussed *infra* note 288 and *infra* text accompanying notes 280-81.

244. The trial court's denial of class certification was affirmed "since application of the principles of *stare decisis* will adequately protect subsequent litigants." *Rivers*, 67 N.Y.2d at 499, 495 N.E.2d at 345, 504 N.Y.S.2d at 82.

245. See N.Y. MENTAL HYG. LAW § 9.27 (McKinney 1978). See generally *id.* §§ 9.01-.59 (McKinney 1978 & Supp. 1987).

246. Harlem Valley Psychiatric Center is a New York state mental hospital. *Rivers*, 67 N.Y.2d at 490, 495 N.E.2d at 339, 504 N.Y.S.2d at 76.

247. Each patient unsuccessfully invoked the state's administrative procedures governing refusal of medication by state hospital patients. *Id.* at 490-91, 495 N.E.2d at 339-40, 504 N.Y.S.2d at 76-77. Under state regulations, before such treatment is ordered over a patient's objection, the decision to medicate must be reviewed by "the head of the service." 14 N.Y. COMP. CODES R. & REGS. tit. 14, § 27.8(c) (1986). Aggrieved patients then have a right to a counseled appeal before the facility director. *Id.* § 27.8(d), (e)(1). That decision may then be appealed to the regional director of the state department of mental hygiene. *Id.* § 27.8(e)(3).

medications.²⁴⁸ In each instance, after the court overrode the patients' objections and the medications were involuntarily administered, the patients filed declaratory judgment actions²⁴⁹ against the state commissioner of mental hygiene and hospital officials "to enjoin the nonconsensual administration of antipsychotic drugs and to obtain a declaration of their common-law and constitutional right to refuse medication."²⁵⁰

Reversing the trial court's dismissal, the court of appeals held that the due process clause of the *state* constitution²⁵¹ "affords involuntarily committed mental patients a fundamental right to refuse antipsychotic medication,"²⁵² and that "neither mental illness nor institutionalization per se can stand as a justification for overriding an individual's fundamental right to refuse antipsychotic medication on either police power or *parens patriae* grounds."²⁵³

First, the court restated the "firmly established" and "faithfully adhered to" common-law principles²⁵⁴ that "every individual 'of adult

248. Plaintiff Rivers was medicated with Prolixin Hydrochloride, Prolixin Decanoate, and Mellaril. *Rivers*, 67 N.Y.2d at 491, 495 N.E.2d at 340, 504 N.Y.S.2d at 77. Plaintiff Zatz was medicated with Navene and lithium, and plaintiff Grassi was medicated with Prolixin Hydrochloride. *Id.* at 492, 495 N.E.2d at 340, 504 N.Y.S.2d at 77. The court discussed both the usefulness and the side effects of antipsychotic drugs. *Id.* at 490 n.1, 495 N.E.2d at 339 n.1, 504 N.Y.S.2d at 76 n.1. The administration of lithium—a drug first administered in 1949 and given to ameliorate manic episodes in patients with manic-depressive illness—was not specifically challenged in any of the cases cited by the court. See Cade, *Lithium Salts in the Treatment of Psychotic Excitement*, 36 MED. J. AUST. 349 (1949); Fieve, *Lithium Therapy*, in 2 FREEDMAN, KAPLAN & SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY II 1982 (2d ed. 1975).

249. Plaintiffs Rivers and Zatz filed one action, while plaintiff Grassi filed a separate action. *Rivers*, 67 N.Y.2d at 491, 495 N.E.2d at 340, 504 N.Y.S.2d at 77.

250. *Id.* The trial court had dismissed plaintiffs' complaints, on the theory that "the involuntary retention orders necessarily determined that these patients were so impaired by their mental illness that they were unable to competently make a choice in respect to their treatment," *id.*, and the Appellate Division affirmed for the reasons stated by the trial court in *Rivers v. Katz*, 112 A.D.2d 926, 491 N.Y.S.2d 1011 (1985), *rev'd*, 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986).

251. N.Y. CONST. art. I, § 6. On the other hand, the New York Court of Appeals had *refused* to construe the state constitution more expansively than the United States Supreme Court had interpreted the parallel provision of the federal Constitution in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). See *Shad Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 488 N.E.2d 1211, 498 N.Y.S.2d 99 (1985) (free speech provision of state constitution did not preclude mall owner from enforcing, in the absence of state action, blanket no-handbilling policy). All relevant cases are discussed in Ragosta, *Free Speech Access to Shopping Malls Under State Constitutions: Analysis and Rejection*, 37 SYRACUSE L. REV. 1 (1986).

252. *Rivers*, 67 N.Y.2d at 492, 495 N.E.2d at 341, 504 N.Y.S.2d at 78.

253. *Id.* at 498, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

254. *Id.* at 492, 495 N.E.2d at 341, 504 N.Y.S.2d at 78. The court added that these principles were also recognized by the state legislature. *Id.* (citing N.Y. PUB. HEALTH LAW

years and sound mind has a right to determine what shall be done with his own body' ”²⁵⁵ and to control the course of his medical treatment.²⁵⁶ In the case of competent patients, this “fundamental” right, which is co-extensive with the patient’s liberty interest protected by the state constitution’s due process clause,²⁵⁷ must be honored “even though the recommended treatment may be beneficial or even necessary to preserve the patient’s life.”²⁵⁸

The court specifically rejected defendants’ argument that involuntarily committed mental patients were “presumptively incompetent” to exercise this right because involuntary commitment included an implicit determination “that the patient’s illness has so impaired his judgment as to render him incapable of making decisions regarding treatment and care.”²⁵⁹ Without more, neither the fact of mental illness nor the fact of commitment “constitutes a sufficient basis to conclude that [such pa-

§§ 2504, 2805-d (McKinney 1985 & Supp. 1987); N.Y. CIV. PRAC. L. & R. 4401-a (McKinney Supp. 1987); N.Y. COMP. CODES R. & REGS. tit. 10, § 405.25(a)(7) (1986)).

The cited sections provide for informed consent of adult individuals in situations involving “medical, dental, health and hospital services,” N.Y. PUB. HEALTH LAW § 2504(1) (McKinney 1985), set out the elements of and defenses to a medical malpractice claim based on an alleged lack of informed consent, *id.* § 2805-d(1) to (4), set the standard upon which to assess a motion for judgment at the end of plaintiff’s case in such an action, N.Y. CIV. PRAC. L. & R. 4401-a, and mandate that hospitals establish written policies affording patients the right to “refuse treatment to the extent permitted by law and to be informed of the medical consequences of [their] action[s],” 10 N.Y. COMP. CODES R. & REGS. tit. 10, § 405.25(a)(7).

255. *Rivers*, 67 N.Y.2d at 492, 495 N.E.2d at 341, 504 N.Y.S.2d at 78 (quoting *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914)).

256. *Rivers*, 67 N.Y.2d at 492, 495 N.E.2d at 341, 504 N.Y.S.2d at 78. The court cited *Schloendorff*, 211 N.Y. at 129-30, 105 N.E. at 93 (except in the case of an emergency, every patient has a common right to determine what should be done with his own body) and *In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981) (“right to die” case, holding that, where, prior to becoming incompetent, an elderly patient had consistently expressed his desire not to have his life prolonged by medical means if there was no hope for recovery, it was proper for the court to approve discontinuance of a respirator on which he was being maintained in a permanent vegetative state).

257. *Rivers*, 67 N.Y.2d at 493, 495 N.E.2d at 341, 504 N.Y.S.2d at 78; *see also* *Cooper v. Morin*, 49 N.Y.2d 69, 399 N.E.2d 1188, 424 N.Y.S.2d 168 (1979), *cert. denied*, 446 U.S. 984 (1980) (applying due process clause of state constitution to question of adequacy of jail conditions); *cf.* *Bell v. Wolfish*, 441 U.S. 520 (1979) (inmate rights under federal Constitution).

258. *Rivers*, 67 N.Y.2d at 493, 495 N.E.2d at 341, 504 N.Y.S.2d at 78 (citing *In re Storar*, 52 N.Y.2d 363, 377, 420 N.E.2d 64, 73, 438 N.Y.S.2d 266, 273 (1981)). The court added:

In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires This right extends equally to mentally ill persons who are not to be treated as persons of lesser status or dignity because of their illness.

Id.

259. *Id.*

tients] lack the mental capacity to comprehend the consequences of their decision to refuse medication that poses a significant risk to their physical well-being.”²⁶⁰

On the other hand, the court recognized that the right to reject antipsychotic medication was not absolute, and that, under certain circumstances, it might have to yield to compelling state interests:²⁶¹ in an “emergency situation” where the patient was an “imminent danger to [another] patient or others in the immediate vicinity,”²⁶² or, under the state’s *parens patriae* power where an individual is “incapable of making a competent decision concerning treatment on his own . . . [and] lacks

260. *Id.* at 494, 495 N.E.2d at 341-42, 504 N.Y.S.2d at 78-79; *see also Rennie*, 653 F.2d at 846 n.12 (“It is simply not true that all persons involuntarily committed are always incapable of making a rational decision on treatment. . . . Psychiatric literature indicates that many forms of mental illness have a highly specific impact on the victims, leaving decision-making capacity and reasoning ability largely unimpaired.”); *Rogers*, 634 F.2d at 658-59.

The court in *Rivers* added that it was “well-accepted” that mental illness “often strikes only limited areas of functioning, leaving other areas unimpaired,” and, as a result, “many mentally ill persons retain the capacity to function in a competent manner.” 67 N.Y.2d at 494, 495 N.E.2d at 342-43, 504 N.Y.S.2d at 79.

In fact, the court stressed, the “nearly unanimous modern trend” in the courts and among both medical and legal commentators is to recognize “that there is no significant relationship between the need for hospitalization of mentally ill patients and their ability to make treatment decisions.” *Id.* at 494 & nn. 4-5, 495 N.E.2d at 342 & nn. 4-5, 504 N.Y.S.2d at 79 & nn. 4-5. It concluded on this point by quoting Professor Brooks: “[T]here is ample evidence that many patients, despite their mental illness are capable of making rational and knowledgeable decisions about medications. The fact that a mental patient may disagree with the psychiatrist’s judgment about the benefit of medication outweighing the cost does not make the patient’s decision incompetent.” *Id.* at 495, 495 N.E.2d at 342, 504 N.Y.S.2d at 79 (quoting Brooks, *Constitutional Right to Refuse Antipsychotic Medications*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 179, 191 (1980)).

261. *Rivers*, 67 N.Y.2d at 495, 495 N.E.2d at 343, 504 N.Y.S.2d at 79.

262. *Id.* Under state regulations, facilities may treat objecting patients “where the treatment appears necessary to avoid serious harm to life or limb of the patients themselves or others.” N.Y. COMP. CODES R. & REGS. tit. 14, § 27.8(b)(1) (1986); *see also id.* § 27.8(b)(3). This exception, the court explained, was premised on the state’s police power. *Rivers*, 67 N.Y.2d at 496, 495 N.E.2d at 343, 504 N.Y.S.2d at 80. It noted, however, that no such claim was advanced by defendants in the case before it. *Id.* In a footnote, the court explained what this exception does *not* include:

Any implication that State interests unrelated to the patient’s well-being or those around him can outweigh his fundamental autonomy interest is rejected. Thus, the State’s interest in providing a therapeutic environment, in preserving the time and resources of the hospital staff, in increasing the process of deinstitutionalization and in maintaining the ethical integrity of the medical profession, while important, cannot outweigh the fundamental individual rights here asserted. It is the needs and desires of the individual, not the requirements of the institution, that are paramount.

Id. at 495 n.6, 495 N.E.2d at 343 n.6, 504 N.Y.S.2d at 80 n.6. In *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982), the Court stated that “[i]n deciding this case, we have weighed those postcommitment interests cognizable as liberty interests under the Due Process Clause of the Fourteenth Amendment against legitimate state interests and in light of the constraints under which most state institutions necessarily operate.” *Id.* at 324 (emphasis added).

the capacity to decide for himself whether he should take the drugs.' ”²⁶³

The court reasoned that prior judicial determination in the latter group of cases should be in the nature of a *de novo* hearing, following exhaustion of the state's administrative review procedures.²⁶⁴ At this counseled²⁶⁵ hearing, the state bears the burden of demonstrating, by clear and convincing evidence,²⁶⁶ the patient's incapacity to make a treatment decision.²⁶⁷ If the court determines that the patient has the capability of making his own treatment decision, the state is precluded from administering such drugs.²⁶⁸ On the other hand, if the court determines the patient lacks such capacity

the court must determine whether the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive alternative treatments. The State would bear the burden to establish by clear

263. *Rivers*, 67 N.Y.2d at 496, 495 N.E.2d at 343, 504 N.Y.S.2d at 80 (quoting *Rogers v. Okin*, 634 F.2d 651, 657 (1st Cir. 1980)).

This determination, the court underscored, “is uniquely a judicial, not a medical function.” *Id.* Due process thus requires that “a court balance the individual's liberty interest against the State's asserted compelling need on the facts of each case to determine whether such medication may be forcibly administered.” *Id.* at 498, 495 N.E.2d at 344, 504 N.Y.S.2d at 81 (emphasis added); cf. *State v. Fields*, 77 N.J. 282, 308, 390 A.2d 574, 587 (1978) (“The final decision on the need for and appropriate extent of restrictions on the committee's liberty is for the court, not the psychiatrists.”) (emphasis in original).

264. *Rivers*, 67 N.Y.2d at 97, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

265. *Id.* (citing N.Y. JUD. LAW § 35(1)(a) (McKinney 1983)) (counsel may be assigned in civil commitment proceedings if the court is satisfied the individual is financially unable to obtain counsel).

266. *Id.*; see also *Addington v. Texas*, 441 U.S. 418, 424 (1979) (intermediate burden of proof constitutionally mandated at civil commitment hearings used where “interests at stake . . . are deemed to be more substantial than mere loss of money”).

267. *Rivers*, 67 N.Y.2d at 97, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

268. *Id.* The court listed eight factors that might be considered in evaluating an individual's capability to consent to or refuse treatment:

(1) the person's knowledge that he has a choice to make; (2) the patient's ability to understand the available options, their advantages and disadvantages; (3) the patient's cognitive capacity to consider the relevant factors; (4) the absence of any interfering pathologic perception or belief, such as a delusion concerning the decision; (5) the absence of any interfering emotional state, such as severe manic depression, euphoria or emotional disability; (6) the absence of any interfering pathologic motivational pressure; (7) the absence of any interfering pathologic relationship, such as the conviction of helpless dependency on another person; (8) an awareness of how others view the decision, the general social attitude toward the choices and an understanding of his reason for deviating from that attitude if he does.

Id. at n.7 (citing Michels, *Competence to Refuse Treatment*, in *REFUSING TREATMENT IN MENTAL HEALTH INSTITUTIONS* 115, 117-18 (Douden & Swazey 1979)).

and convincing evidence that the proposed treatment meets these criteria.²⁶⁹

The court concluded that the state administrative review procedures failed to meet state constitutional muster.²⁷⁰ The regulations were deficient in that they did not articulate "the standards to be followed or criteria to be considered at each stage of the administrative process" in such matters as the patient's need for a particular drug, whether the drug is the "least intrusive, whether it is capable of producing the least serious side effects, and the proper length of its use."²⁷¹

Finally, the court ruled that state law mandating that hospital professional staff act "'within the scope of professional license'"²⁷² applied to the administrative process. It further held that such "medical determinations as to the need to administer antipsychotic drugs must honor the patient's due process rights and be made in accordance with accepted professional judgment, practice and standards."²⁷³

Rivers is an important case for six reasons. First, on the merits, there is virtually nothing in the opinion acknowledging the split²⁷⁴ in the way courts have construed the right to refuse treatment following the Supreme Court's decision in *Mills v. Rogers*²⁷⁵ and the Third Circuit's *Rennie v. Klein* remand decision.²⁷⁶ While there is a "but see" citation to *Stensvad v. Reivitz*²⁷⁷ on the question of the relationship between institu-

269. *Id.* at 497-98, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

270. *Id.* at 498, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

271. *Id.* The court noted that:

The absence of any standard for determining the permissible duration of forced medication [was] particularly disturbing. Manifestly, when the medication is necessitated by the patient's dangerousness, a circumstance that would implicate the State's police power interest, it may well be that the need would continue only for so long as the dangerous condition exists. The determination would not necessarily imply incapacity and thus would not provide a justifiable basis for the exercise of the State's *parens patriae* authority to override the patient's objection or to continue the medication for a protracted period. When the medication is determined to be necessary in order to care for a patient who is unable to care for himself because of mental illness, the State's *parens patriae* power would be implicated, which, as we have said, may only be employed when it has been determined that the patient is unable to make a treatment decision.

Id. at 498, 495 N.E.2d at 344-45, 504 N.Y.S.2d at 81-82.

272. *Id.*, 495 N.E.2d at 345, 504 N.Y.S.2d at 82 (quoting N.Y. MENTAL HYG. LAW § 33.03(b)(3) (McKinney 1978)). Under this section of the mental health law, "in order to assure protection of patients in their care and treatment [there must be an] order of a staff member operating within the scope of a professional license for any treatment or therapy based on appropriate examination." N.Y. MENTAL HYG. LAW § 33.03(b)(3).

273. *Rivers*, 67 N.Y.2d at 498-99, 495 N.E.2d at 345, 504 N.Y.S.2d at 82.

274. See generally Perlin, *supra* note 72.

275. 457 U.S. 291; see also Perlin, *supra* note 74, at 7-8, 19-20 nn.126-34.

276. *Rennie*, 720 F.2d 266; see also Perlin, *supra* note 72.

277. 601 F. Supp. 128 (W.D. Wis. 1985); see also Perlin, *supra* note 72.

tionalization and treatment decision-making capacity,²⁷⁸ a reading of *Rivers* alone would give little indication of the range of developments in the right to refuse treatment since 1982.²⁷⁹

Second, *Rivers* makes no mention of *Project Release v. Prevost*,²⁸⁰ a Second Circuit Court of Appeals opinion which *upheld* on federal constitutional grounds²⁸¹ the regulation struck down on *state* constitutional grounds by the *Rivers* court. The absence of any mention of *Project Release* is thus particularly stark. Third, the expansion of the class of drugs covered by the opinion to include lithium²⁸² is a significant quantitative and qualitative increase in the universe of drugging decisions in which constitutional due process decisions are now implicated.²⁸³

Fourth, the use in *Rivers* of a pre-administration judicial hearing—like that ordered by the Massachusetts Supreme Judicial Court in the *Rogers* remand²⁸⁴—is a ringing endorsement of the *judicial* model in an area where it appears likely that the United States Supreme Court would accept a more informal, medically-focused model so as to adequately satisfy the demands of the due process clause of the federal Constitution.²⁸⁵

278. *Rivers*, 67 N.Y.2d at 494 n.4, 495 N.E.2d at 342 n.4, 504 N.Y.S.2d at 79 n.4.

279. The year of remand in *Mills* and *Rennie* was 1982. *Mills*, 457 U.S. 291 (1982); *Rennie*, 458 U.S. 1119 (1982).

280. 722 F.2d 960 (2d Cir. 1983).

281. *Id.* at 980-81.

282. *Rivers*, 67 N.Y.2d at 491, 495 N.E.2d at 340, 504 N.Y.S.2d at 77.

283. There are important clinical side effect issues raised by the use of lithium. See, e.g., Bar, Nathan, Brenner & Horowitz, *Nonspecific Stomatitis Due to Lithium Therapy*, 142 AM. J. PSYCHIATRY 1126 (1985) (letter to the editor); Cohen & Cohen, *Lithium Carbonate, Haloperidol, and Irreversible Brain Damage*, 230 J. AM. MED. A. 1283 (1974); Crews & Carpenter, *Lithium-Induced Aggravation of Tardive Dyskinesia*, 134 AM. J. PSYCHIATRY 933 (1977); Kane, *Extrapyramidal Side Effects with Lithium Treatment*, 135 AM. J. PSYCHIATRY 851 (1978); Mann, Greenstein & Eilers, *Early Onset of Severe Dyskinesia Following Lithium-Haloperidol Treatment*, 140 AM. J. PSYCHIATRY 1385 (1983) (letter to the editor); Reisberg & Gershon, *Side Effects Associated with Lithium Therapy*, 36 ARCHIVES GEN. PSYCHIATRY 879 (1979); Shukla, *Lithium-Carbamazepine Neurotoxicity and Risk Factors*, 141 AM. J. PSYCHIATRY 1604 (1984); Shukla & Mukherjee, *Lichen Simplex Chronicus During Lithium Treatment*, 141 AM. J. PSYCHIATRY 909 (1984); Spring & Frankel, *New Data on Lithium and Haloperidol Incompatibility*, 138 AM. J. PSYCHIATRY 818 (1981); Zorumski & Bakris, *Choreoathetosis Associated with Lithium: Case Report and Literature Review*, 140 AM. J. PSYCHIATRY 1621 (1983). However, none of these is mentioned in the course of *Rivers*. The decision's "side effects footnote" cites solely to articles and cases discussing the narrower class of drugs before the court in *Rennie* and *Rogers*. *Rivers*, 67 N.Y.2d at 490 n.1, 495 N.E.2d at 339 n.1, 504 N.Y.S.2d at 76 n.1; cf. *Mills*, 457 U.S. at 293 n.1.

284. *Rogers v. Commissioner of the Dep't of Mental Health*, 390 Mass. 489, 495-500, 458 N.E.2d 308, 313-15 (1983).

285. See, e.g., *Youngberg*, 457 U.S. at 322-23 ("[T]here certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions [about internal operations of state mental institutions]."); Roth, *The Right to Refuse Psychiatric Treatment: Law and Medicine at the Interface*, 35 EMORY L.J. 139, 157 (1986) ("[W]hile

Fifth, *Rivers*'s paraphrase of the "professional judgment" language used by the United States Supreme Court in *Youngberg* to support its holding that, in the administrative process, "medical determinations as to the need to administer antipsychotic drugs must honor the patient's due process rights,"²⁸⁶ is more than mildly ironic. The *Youngberg* language is now generally used to countenance more informal procedures²⁸⁷ and as a standard under which "the judgment of medical authorities should determine the most efficacious treatment modality that will satisfy the treatment needs of the patient."²⁸⁸ It is *not* ordinarily used as justification for a due process model which is in some ways stricter than the trial court's original remedy in *Rennie*.²⁸⁹

Sixth, the decision's sole reliance on state constitutional law²⁹⁰ may be its most important legacy. Given the shift in attitude in the United

the 'right to refuse' is a fascinating issue for law and psychiatry, the problem remains clinical."). Dr. Roth has written significantly and extensively about both the ethical and empirical issues raised by the implementation of the right to refuse treatment. See, e.g., Meisel, Roth & Lidz, *Toward a Model of the Legal Doctrine of Informed Consent*, 134 AM. J. PSYCHIATRY 285 (1977); Roth & Appelbaum, *What We Do and Do Not Know About Treatment Refusals in Mental Institutions*, in REFUSING TREATMENT, *supra* note 234, at 179; Roth, *Competency to Decide About Treatment or Research*, 5 INT'L J.L. & PSYCHIATRY 29 (1982); Roth, *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCHIATRY 279 (1977).

286. *Rivers*, 67 N.Y.2d at 498-99, 495 N.E.2d at 345, 504 N.Y.S.2d at 82.

287. See *Rennie*, 720 F.2d at 269-70; see also *supra* notes 68-70 and accompanying text.

288. Hermann, *Barriers to Providing Effective Treatment: A Critique of Revisions in Procedural, Substantive, and Dispositional Criteria in Involuntary Civil Commitment*, 39 VAND. L. REV. 83, 105 (1986). *Project Release* relied specifically on *Youngberg*'s "professional judgment" language in its determination that the state regulations under attack met federal constitutional muster. *Project Release*, 722 F.2d at 981 (citing *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)).

289. See *Rennie*, 476 F. Supp. at 1314 (independent psychiatrists shall hold informal hearings). In addition, while *Rennie* discarded the "least intrusive means" analysis on remand in light of *Youngberg*, 720 F.2d at 269-70, see Perlin, *supra* note 74, at 7-8, 20 nn.134-35, *Rivers* resurrects it, without any mention of the *Youngberg* decision. Cf. *Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 1187 (1985) (citing, in a "cf." reference, to the "professional judgment" language of *Youngberg v. Romeo*, 457 U.S. 307, 321-23 (1982)).

Several commentators have analyzed *Bee*, which employed a "least restrictive alternative" analysis in a case concerning a pretrial detainee's right to refuse treatment. See, e.g., Bunn, *More Meaningful Protection for the Right to Refuse Antipsychotic Drugs*, 62 CHI.-KENT L. REV. 323, 340 (1985) (*Bee*'s "refinement of the professional judgment standard clearly provides more meaningful protection for the right to refuse antipsychotic drugs"; impact of case's protection of plaintiffs at trial still "unclear"); Note, *Bee v. Greaves: Pretrial Detention and the Constitutional Right to Refuse Antipsychotic Drugs—A Missed Opportunity to Protect Fundamental Rights*, 22 AM. CRIM. L. REV. 835 (1985); Note, *Bee v. Greaves: A Pretrial Detainee's Constitutional Right to Refuse Antipsychotic Drugs Under the First and Fourteenth Amendments*, 63 DEN. U.L. REV. 273 (1986).

290. While the opinion cites to common-law authorities as well, it notes that these protections are "coextensive with the patient's liberty interest protected by the due process clause of our State Constitution." *Rivers*, 67 N.Y.2d at 493, 495 N.E.2d at 341, 504 N.Y.S.2d at 78.

States Supreme Court on cases involving institutional reform and its concomitant emphasis on professional deference,²⁹¹ and the general renaissance of state constitutional law as a source of rights in matters involving civil liberties,²⁹² the broad articulation of a state constitutional right in *Rivers* may reasonably be expected to have an impact both beyond the geographic borders of New York and beyond the subject-matter confines of the question of the right of the institutionalized mentally disabled to refuse treatment.

Although several other state cases have used state constitutions as the source of finding similar rights,²⁹³ none appears to have the potential scope and impact of *Rivers*.²⁹⁴ While it is far too early to speculate as to *Rivers*' ultimate impact, it should be self-evident that it is available as a model to high courts of other states, if they wish to "sidestep"²⁹⁵ the Supreme Court's decisions in *Mills* and *Youngberg* and the Third Circuit's cutbacks in its *Rennie* remand decision.

3. Right to treatment

Surprisingly, there has been virtually no caselaw on the question of a state constitutional right to treatment on behalf of mentally disabled persons.²⁹⁶ While ambiguities in decisions by the highest appellate courts in both New Jersey²⁹⁷ and New York²⁹⁸ may be so interpreted, there have

291. See *supra* text accompanying notes 69-99.

292. See *supra* notes 154-90 and accompanying text.

293. A right to refuse treatment has been found under the New Hampshire state constitution in Opinion of the Justices, 123 N.H. 554, 465 A.2d 484 (1983). There, in one of the broadest readings, the New Hampshire Supreme Court looked specifically at the state constitutional provision granting "mentally ill persons, like all other individuals, . . . certain fundamental liberty interests" in finding that patients have "a right to be free from unjustified intrusion upon their personal security," which includes a qualified right to refuse treatment as "a liberty interest which is protected by our State Constitution." *Id.* at 559-60, 465 A.2d at 488-89; see also *Large v. Superior Court*, 148 Ariz. 229, 714 P.2d 399 (1986) (right to refuse treatment for mentally ill convicts); *Bartling v. Superior Court*, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984) (right to refuse treatment for incurably ill non-psychiatric patients who seek the discontinuation of artificial life support systems).

294. It is ironic that, while *Rivers* declared a broad right to refuse treatment on state constitutional law grounds (ignoring the contrary federal constitutional decision of *Project Release*), the *Rennie* trial court originally rejected defendants' abstention argument, in part, because a New Jersey state trial court had previously approved—on state law grounds—of the involuntary administration of psychotropic drugs to resisting patients. See *Rennie*, 462 F. Supp. at 1142; *In re Hospitalization of B.*, 156 N.J. Super. 231, 383 A.2d 760 (Law Div. 1977).

295. See generally *supra* note 96. See also Brant, *The Hostility of the Burger Court to Mental Health Law Reform Litigation*, 11 BULL. AM. ACAD. PSYCHIATRY & L. 77, 83 (1983); Kemna, *supra* note 234, at 132.

296. Cf. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

297. See, e.g., *State v. Krol*, 68 N.J. 236, 253-63, 344 A.2d 289, 299-303 (1975).

298. See, e.g., *Lavette M. v. Corporation Counsel*, 35 N.Y.2d 136, 143, 316 N.E.2d 314,

been no cases holding squarely that there is such a state constitutional right.²⁹⁹

4. Rights involving sterilization

Several courts have weighed state constitutional provisions along with their federal counterparts in cases involving petitions for involuntary sterilization of minors or incompetent persons,³⁰⁰ and have found both the right to be sterilized³⁰¹ and the right to autonomy in sterilization decision-making to be protected by such provisions.³⁰²

The New Jersey Supreme Court, for instance, first recognized that, although a right to sterilization had not received express constitutional protection from the United States Supreme Court, several lower courts had found such a right,³⁰³ and that, drawing on its historic decision in *In re Quinlan*,³⁰⁴ the right to be sterilized was included in the privacy rights afforded by the federal Constitution.³⁰⁵ Beyond this basis, however, the

317, 359 N.Y.S.2d 20, 24 (1974) (citing, in a "cf." reference, *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 305 N.E.2d 903, 350 N.Y.S.2d 889 (1973), for proposition that "failure to provide suitable and adequate treatment [cannot] be justified by lack of staff or facilities.").

299. See, e.g., *In re K.K.B.*, 609 P.2d 747, 749 (Okla. 1980) (footnote omitted) ("Other courts have consistently held a patient in a mental hospital has a constitutional right to meaningful treatment. We adopt this view and hold it is the law in the State of Oklahoma."). There is, however, no citation to the Oklahoma state constitution, and the cases cited in the omitted footnote are all federal constitutional decisions. See *id.* at n.6.

In *Chill v. Mississippi Hospital Reimbursement Commission*, 429 So. 2d 574, 580 (Miss. 1983), while holding that the state could properly charge a patient for the reasonable costs of his care, maintenance and treatment, the Mississippi Supreme Court noted that the state constitution vested in the legislature the duty to provide the mentally ill with care and treatment. *Id.* at 579 (citing MISS. CONST. art. IV, § 86). *Chill* is discussed *infra* at text accompanying notes 490-93.

300. In addition to the cases discussed *infra* text accompanying notes 301-12, see *Eberhardy v. Circuit Court*, 102 Wis. 2d 539, 548-51, 307 N.W.2d 881, 885-87 (1981) (discussing circuit court's state constitutional right to rule on petition by guardian seeking to have adult mentally retarded daughter sterilized). The Alaska Supreme Court has held that a trial court of general jurisdiction had, pursuant to the state constitution, broad *parens patriae* power over incompetents, enabling it to act upon a petition seeking sterilization filed by guardian of noninstitutionalized, adult mentally disabled woman afflicted with Down's Syndrome. *K.C.M. v. Alaska*, 627 P.2d 607, 609-12 (Alaska 1981) (citing *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re Grady*, 85 N.J. 235, 426 A.2d 467 (1981); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976)).

301. *In re Grady*, 85 N.J. 235, 426 A.2d 467 (1981).

302. *Conservatorship of Valerie N.*, 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985).

303. *Grady*, 85 N.J. at 248-49, 426 A.2d at 474 (citing *Hathaway v. Worcester City Hosp.*, 475 F.2d 701 (1st Cir. 1973); *Ruby v. Massey*, 452 F. Supp. 361 (D. Conn. 1978)).

304. *Quinlan*, 70 N.J. at 40, 355 A.2d at 663 (right to privacy found in state constitution); see N.J. CONST. art. 1, ¶ 1.

305. *Grady*, 85 N.J. at 249, 426 A.2d at 474. The application in the *Grady* case was brought

New Jersey Supreme Court specifically found that the right was also protected by the state constitution,³⁰⁶ and that "the governmental intrusion into privacy rights may require more persuasive showing of a public interest under our State Constitution than under the federal Constitution."³⁰⁷

The California Supreme Court—in addition to finding that state legislation³⁰⁸ which absolutely forbade sterilization of persons³⁰⁹ under conservatorship deprived developmentally disabled persons of their privacy rights under the state and federal constitutions³¹⁰—also found that the right of a woman "to choose whether or not to bear a child and thus to control her social role and personal destiny"³¹¹ was a fundamental right under the same state constitutional provision,³¹² which could be restricted only by a compelling state interest.³¹³

5. Other issues involving the mentally disabled

In addition, other courts have invoked state constitutional provisions in cases involving the scope of testimonial privilege which can be invoked by a psychotherapist,³¹⁴ a court's authority to order a state

by the parents of a noninstitutionalized 19-year old daughter similarly afflicted with Down's Syndrome. *Id.* at 240-41, 426 A.2d at 469-70.

306. *Id.* at 249, 426 A.2d at 474 (citing N.J. CONST. art I, ¶ 1).

307. *Id.*; see also *In re Moe*, 385 Mass. 555, 563-64, 432 N.E.2d 712, 719 (1982) (United States Supreme Court has "implicitly recognized that the right of a person to be sterilized is a fundamental right"; court also relies on other cases to support "right of a person to be free from nonconsensual invasion of bodily integrity").

308. In *Mildred G. v. Valerie N.*, 40 Cal. 3d 143, 160-61, 707 P.2d 760, 771-72, 219 Cal. Rptr. 387, 398-99 (1985), part of the California probate code, subsequently amended, was declared unconstitutional.

309. The *Valerie N.* case was brought by parents who were co-conservators of their adult developmentally disabled daughter who, like the subjects of the petition in *Grady* and *K.C.M.*, was afflicted with Down's Syndrome. *Valerie N.*, 40 Cal. 3d at 148, 707 P.2d at 762, 219 Cal. Rptr. at 389-90.

310. *Valerie N.*, 40 Cal. 3d at 160-63, 707 P.2d at 771-74, 219 Cal. Rptr. at 399-401 (citing CAL. CONST. art. I, § 1).

311. *Id.* at 163, 707 P.2d at 774, 219 Cal. Rptr. at 401.

312. *Id.*; see CAL. CONST. art. I, § 1.

313. *Valerie N.*, 40 Cal. 3d at 164, 707 P.2d at 774, 219 Cal. Rptr. at 401 (citing CAL. CONST. art. I, §§ 1, 7). But see *id.* at 174-91, 707 P.2d at 781-93, 219 Cal. Rptr. at 408-20 (Bird, C.J., dissenting).

314. See, e.g., *In re B.*, 482 Pa. 471, 484, 394 A.2d 419, 425 (1978) (patient's right to prevent psychiatrist from disclosing certain information obtained in the context of the psychotherapist-patient relationship based on state constitutional right to privacy). This opinion was characterized by petitioner's counsel as "very confused." Meisel, *supra* note 170, at 39 n.168; see *McKirdy v. Superior Court*, 138 Cal. App. 3d 12, 23, 188 Cal. Rptr. 143, 150-51 (1982) (psychotherapy patient's "proper and substantial" interest in privacy of communications with therapist protected in part by state constitutional provision guaranteeing right to privacy outweighed by state's need to investigate alleged fraud in therapist's billing practices); see also

mental health department to pay the cost of care for a mentally disabled child at a private psychiatric hospital,³¹⁵ limitations on the use of a group home by the mentally retarded,³¹⁶ the scope of remedy available to a litigant alleging false imprisonment and false arrest in an involuntary civil commitment proceeding,³¹⁷ and the legality of a reimbursement scheme by which certain relatives of institutionalized mentally disabled persons were billed for the costs of their institutionalization.³¹⁸

D. Conclusion

Thus, while the use of state constitutions as a source of rights for mentally disabled individuals is a comparatively recent development,³¹⁹ and while caselaw is still somewhat limited, decisions such as *Rivers v. Katz* make it likely that, as the Supreme Court continues to be unreceptive to far-reaching and innovative claims brought on behalf of such per-

Wood v. Superior Court, 166 Cal. App. 3d 1138, 1144-48, 212 Cal. Rptr. 811, 817-20 (1985) (same).

315. See *In re Hamil*, 69 Ohio St. 2d 97, 99, 431 N.E.2d 317, 318-19 (1982) (court lacked such authority; state constitutional provision imposed duty solely on state to provide for the handicapped in public facilities).

316. See, e.g., *State ex rel. Thelen v. City of Missoula*, 168 Mont. 375, 380-81, 543 P.2d 173, 176-78 (1975) (statutes providing for community residential facilities for developmentally disabled persons in all residential zones constitutional). The court in *Thelen* relied on a state constitutional section providing that the legislature "shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have need for the aid of society." MONT. CONST. art. XII, § 3(3); see also *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901, cert. denied, 469 U.S. 804 (1984).

317. *Widgeon v. Eastern Shore Hosp. Center*, 300 Md. 520, 535-36, 479 A.2d 921, 930 (1984) (where individual deprived of property interest in violation of federal or state constitutional provision rights enforceable by common-law action for damages). The *Widgeon* court held that state and federal constitutional provisions are to be read "*in pari materia*." *Id.* at 531, 479 A.2d at 927; cf. *Malley v. Briggs*, 106 S. Ct. 1092 (1986) (scope of qualified immunity of police officer in federal damages action). See generally Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269 (1985).

318. *Department of Mental Hygiene v. Kirchner*, 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964), vacated and remanded, 380 U.S. 194, on remand, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965).

The Supreme Court remanded the initial *Kirchner* opinion because that opinion lacked clarity as to whether it struck down the statutory provision on the basis of the state or federal constitution. 380 U.S. at 196-97. On remand, the California Supreme Court noted that, while it had understood that the fourteenth amendment and parallel state constitutional sections provided "generally equivalent but independent protections," it had premised its decision on "our construction and application of California law, regardless of whether there is or is not compulsion to the same end by the federal Constitution." 62 Cal. 2d at 588, 400 P.2d at 322, 43 Cal. Rptr. at 330.

319. But see *supra* text accompanying notes 208-13.

sons, the use of state constitutions as a source of rights will increase significantly in the coming years.

III. STATE STATUTES

A. Introduction

In addition to state constitutional provisions, state statutory provisions are being turned to more frequently as sources of rights for the mentally disabled. While a small body of literature has developed with regard to the use of state constitutions generally,³²⁰ the law reviews have been nearly silent³²¹ on the equally important question of the applicability and utility of state statutory bills of rights to the pertinent substantive and procedural issues.

B. Historical Background

Although several states enacted modest statutes protecting the substantive rights of the institutionalized mentally disabled as early as the 1930's and 1940's,³²² it was not until the publication of the Council on State Government's national report³²³ and the issuance of the National Institute of Mental Health's Draft Act Governing Hospitalization of the Mentally Ill (Draft Act)³²⁴ in the early 1950's that state legislatures be-

320. See, e.g., Meisel, *supra* note 170; Schwartz, *supra* note 203.

321. The major exception has been the work of Professors Martin Levine, Martha Lyon-Levine and Jack Zusman. See Lyon, Levine & Zusman, *Patients' Bills of Rights: A Survey of State Statutes*, 6 MENTAL DISABILITY L. REP. 178 (1982) [hereinafter *Survey I*]; Lyon-Levine, Levine & Zusman, *Developments in Patients' Bills of Rights Since the Mental Health Systems Act*, 9 MENTAL & PHYSICAL DISABILITY L. REP. 146 (1985) [hereinafter *Survey II*]; Levine & Lyon-Levine, *Is Mental Health Rights Protection a Dead Horse? Legislative Processes, Bills of Rights and Advocacy* (1986) (unpublished manuscript) (to be published in NEB. L. REV.).

322. In Massachusetts, statutory enactments providing the institutionalized mentally disabled with limited rights to visitation by counsel and correspondence with institutional officials date to the 19th century. See MASS. GEN. L. ch. 195, § 4 (1879) (visitation); MASS. GEN. L. ch. 363, §§ 1-2 (1874) (correspondence). These sections remained virtually unchanged—see, e.g., MASS. ANN. LAWS, ch. 123, §§ 97-98 (Law. Co-op 1949); MASS. GEN. LAWS ANN. ch. 123, §§ 97-98 (West 1969)—until the 1970 recodification of the Massachusetts mental health code. MASS. GEN. LAWS ANN. ch. 123, § 23 (West 1986); see also ILL. ANN. STAT. ch. 91 1/2, ¶ 9-14 (Smith-Hurd 1951) (providing for institutional investigation if patient is being "cruelly, negligently or improperly treated") (repealed); MICH. COMP. LAWS § 330.62 (1948) (right of state hospital commissioner to promulgate rules and regulations so that hospital patients receive "proper care, attention and treatment"); VT. STAT. ANN. tit. 18, § 7711 (1968) (attorney visitation).

323. COUNCIL OF STATE GOVERNMENTS, *THE MENTAL HEALTH PROGRAMS OF THE FORTY-EIGHT STATES* (1950) [hereinafter CSG].

324. NATIONAL INSTITUTE OF MENTAL HEALTH, *A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL* (1952) [hereinafter DRAFT ACT]. For commentaries discuss-

gan to consider—for the first time—the implications of the notion that individuals' civil rights could not be abrogated simply because of institutionalization.³²⁵

Although the suggestion that patients could retain "all their personal rights" was still labeled as "foolhardy,"³²⁶ there was at least some sense³²⁷ that a "practical ideal for the care and treatment of mental patients"³²⁸ would include the right to "humane care and treatment"³²⁹ and, subject to certain significant limitations,³³⁰ the right to "exercise all civil rights."³³¹ Under the Draft Act, patients were also to be entitled³³² "to communicate by sealed mail or otherwise with persons, including official agencies, inside or outside the hospital"³³³ and to "receive visitors."³³⁴ The commentary to the Draft Act noted that these sections were stated "as broadly as it is possible to do so consistently with the orderly execution of the hospital."³³⁵

ing the Draft Act, see Beaver, *The "Mentally Ill" and the Law: Sisyphus and Zeus*, 1968 UTAH L. REV. 1; Taylor, *A Critical Look Into the Involuntary Civil Commitment Procedure*, 10 WASHBURN L.J. 237 (1971).

325. See generally THE MENTALLY DISABLED AND THE LAW 142-82 (F. Lindman & D. McIntyre eds. 1961) [hereinafter Lindman].

326. *Id.* at 142.

327. See generally DRAFT ACT, *supra* note 324. In summarizing the developments in this area in the American Bar Foundation's Report on the Rights of the Mentally Ill, Lindman and McIntyre reflected significant ambiguity:

The extent to which restrictions should be placed on the rights and freedoms of mental patients, whether voluntary or involuntary, poses a real dilemma. Some restrictions are, no doubt, necessary to further the patient's treatment and welfare. The doctors in charge are in the best position to make this determination. As statutory law now stands, generally speaking, hospital authorities have broad discretion in dealing with the rights of patients but lack official criteria to guide them. The majority of the states are without statutory provisions guaranteeing protection of patients' rights in the area of correspondence and visitation, mechanical restraints, major medical treatment, [and] employment This is an undesirable state of affairs from every point of view.

Lindman, *supra* note 325, at 155.

328. See DRAFT ACT, *supra* note 324, § 19 comment.

329. *Id.* § 19.

330. The exercise of civil rights was to be subject to "the general rules and regulations of the hospital" and "the extent that the head of the hospital determines that it is necessary for the medical welfare of the patient to impose restrictions." *Id.* § 21(a)(3).

331. *Id.* These civil rights were to include "the right to dispose of property, execute instruments, make purchases, enter contractual relationships, and vote unless [the patient had] been adjudicated incompetent and not restored to legal capacity." *Id.* This right, according to the Act's commentary, "follows naturally from the fact that, under the theory of the Act, a determination that hospitalization is justified is entirely different and separate from an adjudication of incompetency." *Id.* § 21(a)(3) comment.

332. See *supra* note 330 for applicable limitations.

333. DRAFT ACT, *supra* note 324, § 21(a)(1).

334. *Id.* § 21(a)(2).

335. *Id.* § 21(a) comment.

In addition, the Draft Act and the State Government Council report also suggested regulation of the imposition of mechanical restraints on the institutionalized³³⁶ and the compulsory "employment" of patients without compensation.³³⁷ Contemporaneous studies prepared by the Group for the Advancement of Psychiatry recommended safeguards against the indiscriminate use of such intrusive interventions as psychosurgery³³⁸ and electroshock treatment.³³⁹

In response to these initiatives and to other governmental, professional and blue-ribbon studies questioning patient treatment at large public institutions,³⁴⁰ states began to enact laws providing some "baseline" protections in the areas discussed. By 1958, nine states adopted the Draft Act's language³⁴¹ as to the exercise of civil rights, communication and visitation,³⁴² and eight provided patients with the right to unrestricted correspondence with attorneys.³⁴³

Although commentators were especially critical of the overuse and misuse of mechanical restraints, as of 1961, only a dozen states attempted to provide any sort of regulation of the practice.³⁴⁴ At the same time, it did not appear as if any state law adequately protected patients against exploitation and abuse in the area of forced labor.³⁴⁵ Finally, only six states made any provision for the regulation of major medical treatment,³⁴⁶ and, of these, only the Kansas law³⁴⁷ could be construed—by the most expansive and charitable reading—to be protective of patients'

336. CSG, *supra* note 323, at 12, 192-94; DRAFT ACT, *supra* note 324, § 20.

337. CSG, *supra* note 323, at 187.

338. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, RESEARCH ON PREFRONTAL LOBOTOMY (1948).

339. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, SHOCK THERAPY (1947).

340. See Lindman, *supra* note 325, at 142-55 & nn.17-18, 26-27, 29, 32-33, 37-40.

341. See *supra* text accompanying notes 331-33.

342. Lindman, *supra* note 325, at 145 n.23. The states were Idaho, Missouri, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, Texas and Utah. See *id.* at 158-59 table V-A. In addition, 11 other states adopted some sort of statute governing visitation alone. *Id.* at 145, 158-59 table V-A.

343. *Id.* at 143 nn.11-12. While Colorado, Illinois, Kentucky, Louisiana, Pennsylvania, Texas and Wisconsin enacted statutes, New York promulgated its policy in an administrative regulation, apparently in response to earlier litigation. See *id.* at 143 (discussing *Hoff v. State*, 279 N.Y. 490, 18 N.E.2d 671 (1939), and *People ex rel. Jacobs v. Worthing*, 167 Misc. 702, 4 N.Y.S.2d 630 (Sup. Ct. 1938)).

344. *Id.* at 146; see also *id.* at 163 table V-B (Georgia, Idaho, Kansas, Kentucky, Massachusetts, Missouri, New Mexico, North Dakota, Oklahoma, Pennsylvania, Texas and Utah).

345. See *id.* at 151-52. Although several states governed nontherapeutic labor by patients, none provided appropriate statutory safeguards. See, e.g., *id.* at 151 nn.79-80.

346. *Id.* at 165 table V-C (Illinois, Kansas, Minnesota, Ohio, Oklahoma and Vermont).

347. KAN. STAT. ANN. § 76-1239 (Supp. 1975) (repealed 1965).

rights.³⁴⁸

In short, prior to the "due process revolution,"³⁴⁹ few states regulated the substantive treatment of the institutionalized mentally disabled. It was not until the district court's decision in *Wyatt v. Stickney*³⁵⁰ that state legislatures began to respond seriously to the issues raised and articulated in the State Government report and the Draft Act.

C. Impact of Wyatt

There can be no doubt concerning the significance of *Wyatt v. Stickney*³⁵¹ as an "influential force"³⁵² in the shaping of modern state-level patients' bills of rights and bills of rights on behalf of the developmentally disabled. The elaborate standards³⁵³ crafted in *Wyatt*—ranging from the global to the ultra-specific, and covering virtually every phase of institutional patient life³⁵⁴—served as the role model for many of the approximately fifteen states³⁵⁵ that either adopted new legislation or expanded existing statutes in the immediate aftermath of *Wyatt*.³⁵⁶

These statutes³⁵⁷—to either a greater or lesser degree—began to

348. While exempting public hospital employees from liability to patients for any physical or mental injury caused by the use of shock treatment, the statute premised immunity on the proviso that "approved and accepted methods and techniques of administering such 'shock' treatment are [to be] used." *Id.*

349. *See supra* note 10.

350. 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341 (M.D. Ala. 1971) (later opinion), 344 F. Supp. 373 (M.D. Ala. 1971) (later opinion), 344 F. Supp. 387 (M.D. Ala. 1972) (later proceeding), *aff'd in part and remanded in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

351. *Id.*

352. *See The Wyatt Standards: An Influential Force in State and Federal Rules*, 28 HOSP. & COMMUNITY PSYCHIATRY 374 (1977) [hereinafter *Influential Force*]. According to Louis Kopelow, M.D., coordinator of patients' rights and advocacy programs for the National Institute of Mental Health, however, *Wyatt* served more as a "'moralizing force'" than as a "specific cause" of the new legislation. *Id.*

353. *Wyatt v. Stickney*, 344 F. Supp. 373, 379-86 (M.D. Ala. 1972); *Wyatt v. Stickney*, 344 F. Supp. 387, 395-408 (M.D. Ala. 1972).

354. *See, e.g.,* Perlin, *supra* note 74, at 2.

355. *See Influential Force, supra* note 352. States which enacted such legislation between the issuance of the *Wyatt* orders in 1972 and the promulgation of the report of the Task Force on Legal and Ethical Issues of the President's Commission on Mental Health in 1978, included Alabama, Alaska, California, Florida, Hawaii, Iowa, Kansas, Michigan, Nebraska, Nevada, New Jersey, Ohio, Pennsylvania, South Dakota and Wisconsin. *Id. See generally Survey I, supra* note 321.

356. For helpful tabular overviews, see E. BEIS, MENTAL HEALTH AND THE LAW 339-58 (1984); B. SALES, DISABLED PERSONS AND THE LAW 849-64 (1982); *Survey I, supra* note 321, at 185-200; *State Survey: Rights of Disabled Persons in Residential Facilities*, 3 MENTAL DISABILITY L. REP. 348 (1979) [hereinafter *State Survey*].

357. Several patients' bills of rights were enacted between the time of the *Wyatt* decision and the publication of the report of the Task Force on Legal and Ethical Issues of the Presi-

track³⁵⁸ *Wyatt* and guarantee³⁵⁹ patients the right to "appropriate treatment and services,"³⁶⁰ to an individualized treatment plan³⁶¹ which is to be periodically reviewed,³⁶² to an aftercare plan,³⁶³ to a humane treat-

dent's Commission on Mental Health. *See infra* notes 397-422 and accompanying text; *see also* D.C. CODE ANN. § 21-501 (1973); IND. CODE ANN. §§ 16-13-1-1 to -32 (Burns 1983 & Supp. 1986); S.C. CODE ANN. §§ 44-25-10 to -60 (Law. Co-op. 1976); WYO. STAT. §§ 25-10-101 to -126 (1977).

Recent codifications of state patients' bills of rights include the following: ALASKA STAT. §§ 47.30.825 to .865 (1984 & Supp. 1986); ARIZ. REV. STAT. ANN. §§ 36-504 to -517 (1986); ARK. STAT. ANN. § 59-1416 (Supp. 1985); CAL. WELF. & INST. CODE §§ 5325-5331 (West 1984 & Supp. 1986); COLO. REV. STAT. §§ 27-10-101 to -129 (1982 & Supp. 1985); CONN. GEN. STAT. ANN. §§ 17-206a to -206k (West 1975 & Supp. 1986); DEL. CODE ANN. tit. 16, § 5161 (1983); D.C. CODE ANN. §§ 21-561 to -565 (1981 & Supp. 1986); FLA. STAT. ANN. § 394.459 (West Supp. 1986); GA. CODE ANN. §§ 37-3-140 to -168 (Harrison 1982); ILL. ANN. STAT. ch. 91 1/2, ¶ 2-100 to -202 (Smith-Hurd Supp. 1985); IND. CODE ANN. §§ 16-14-1.6-1 to -11 (Burns 1983 & Supp. 1986); IOWA CODE ANN. § 229.23 (West 1985); KAN. STAT. ANN. §§ 59-2927 to -2930 (1983); KY. REV. STAT. ANN. § 202A.191 (Baldwin 1982); LA. REV. STAT. ANN. § 28:171 (West Supp. 1986); ME. REV. STAT. ANN. tit. 34-B, § 3803 (Supp. 1986); MD. HEALTH-GEN. CODE ANN. §§ 10-701 to -713 (Supp. 1986); MASS. GEN. LAWS ANN. ch. 123, §§ 23-25 (West Supp. 1986); MICH. STAT. ANN. §§ 14.800(700)-(754) (Callaghan 1980 & Supp. 1985); MINN. STAT. ANN. § 253B.03 (West 1982 & Supp. 1986); MISS. CODE ANN. §§ 41-21-102 (Supp. 1986); MO. ANN. STAT. §§ 630.110 to .200 (Vernon 1986); MONT. CODE ANN. §§ 53-21-142 to -162 (1985); NEV. REV. STAT. §§ 433.464 to .494 (1986); N.H. REV. STAT. ANN. §§ 135-B:42 to :48 (1978 & Supp. 1985); N.J. STAT. ANN. 30:4-24.1 to .2 (West 1981); N.Y. MENTAL HYG. LAW §§ 33.01 to .17 (McKinney 1978 & Supp. 1986); N.D. CENT. CODE §§ 25-03.1-40 to -42 (1978 & Supp. 1983); OHIO REV. CODE ANN. §§ 5122.01 to .301 (Anderson 1981 & Supp. 1985); OKLA. STAT. ANN. tit. 43A, §§ 91 to 93 (West 1979); OR. REV. STAT. §§ 426.380 to .395 (1983); PA. STAT. ANN. tit. 50, §§ 7101-7116 (Purdon Supp. 1986); R.I. GEN. LAWS § 40.1-5-5 (1984); S.C. CODE ANN. §§ 44-23-1010 to -1090 (Law. Co-op. 1985); S.D. Codified Laws ANN. §§ 27A-12-1 to -33 (1984); TENN. CODE ANN. §§ 33-3-104 to -111 (1984 & Supp. 1986); TEX. REV. CIV. STAT. ANN. art. 5547-80 to -87 (Vernon Supp. 1987); UTAH CODE ANN. § 64-7-46 to -48 (Supp. 1985); VT. STAT. ANN. tit. 18, §§ 7701-7711 (Supp. 1986); WASH. REV. CODE ANN. §§ 71.05.360 to .370 (1975); W. VA. CODE § 27-5-9 (1980); WIS. STAT. ANN. § 51.61 (West Supp. 1986).

In addition, other states have adopted bills of rights for the developmentally disabled which generally track the federal Developmental Disabilities Assistance and Bill of Rights Act. *See* 42 U.S.C. §§ 6000-6083 (Supp. III 1985); *see also* ARIZ. REV. STAT. ANN. § 36-551.01; COLO. REV. STAT. §§ 27-10.5-101 to -131 (Supp. 1985); DEL. CODE ANN. tit. 16, § 5501-5507; IND. CODE ANN. §§ 16-14-1.6-1 to -11 (Burns 1983); ME. REV. STAT. ANN. tit. 34-B, §§ 5601-5608; MD. HEALTH-GEN. CODE ANN. §§ 7-601 to -614 (1982 & Supp. 1986); N.H. REV. STAT. ANN. §§ 171-A:1 to 17 (1978); N.J. STAT. ANN. 30:6D-1 to -12 (West 1981).

358. By 1982, virtually all states had some sort of patients' rights legislation in place, but in many cases actual protection was little more than "nominal." Survey I, *supra* note 321, at 179.

359. For a listing of various enforcement mechanisms, see *State Survey, supra* note 356. In New Jersey, for instance, any individual subject to institutionalization in a facility for the mentally disabled shall be "entitled to enforce any of the rights [enumerated in the Patients' Bill of Rights, N.J. STAT. ANN. §§ 30:4-24.1 to 24.2] by civil action or other remedies otherwise available by common law or statute." N.J. STAT. ANN. § 30:4-24.2h.

360. *See, e.g.,* ALASKA STAT. §§ 47.30.655(2), (3) (1984).

361. *See, e.g.,* DEL. CODE ANN. tit. 16, § 5161(2)(e).

362. *See, e.g.,* CONN. GEN. STAT. ANN. § 17-206(f) (West 1975).

363. *See, e.g.,* MONT. CODE ANN. § 53-21-162(3).

ment environment,³⁶⁴ and to privacy³⁶⁵ and safety.³⁶⁶ Similarly, other statutory provisions mandated a right to refuse treatment³⁶⁷ and to such communications rights³⁶⁸ as the right to converse privately,³⁶⁹ to have visitors,³⁷⁰ and to communicate by telephone³⁷¹ and mail.³⁷²

In addition, certain jurisdictions provided patients with the right to an explanation regarding their treatment,³⁷³ and with certain rights regarding the records of their institutionalization and notice of their substantive treatment rights while hospitalized: confidentiality of records,³⁷⁴ access to one's own records³⁷⁵ (both before and after discharge),³⁷⁶ and information as to one's rights (both orally³⁷⁷ and through posted notices).³⁷⁸

Also, statutes were amended and rewritten to provide patients with a mechanism through which they could assert grievances³⁷⁹ through some sort of administrative structure³⁸⁰ and with access by a legal representative³⁸¹ or to a patient advocate.³⁸² Other laws specified that there could be no reprisals against patients for asserting their rights,³⁸³ and that patients were entitled to a whole range of civil rights while institutionalized,³⁸⁴ including the right to free practice of religion,³⁸⁵ to be com-

364. See, e.g., N.M. STAT. ANN. § 43-1-6(D) (1978).

365. See, e.g., OHIO REV. CODE ANN. § 5122.29(G) (Anderson 1981).

366. See, e.g., MO. ANN. STAT. § 630.110.1(3) (Vernon Supp. 1986).

367. See, e.g., KAN. STAT. ANN. § 59-2929(a)(6), (b). An earlier statutory survey on this specific right can be found in Plotkin, *supra* note 234, at 504-25.

368. See generally, Perlin, *Other Rights of Residents in Institutions*, in 2 LEGAL RIGHTS, *supra* note 31, at 1009.

369. See, e.g., LA. REV. STAT. ANN. § 28:171(c) (West 1978).

370. See, e.g., ILL. ANN. STAT. ch. 91 1/2, ¶ 2-103.

371. See, e.g., IOWA CODE ANN. § 229.23(3) (West 1985) (as amended).

372. See, e.g., OKLA. STAT. ANN. tit. 43A, § 93.

373. See, e.g., CAL. WELF. & INST. CODE § 5326.2 (West 1984).

374. See, e.g., FLA. STAT. ANN. § 394.459(9).

375. See, e.g., COLO. REV. STAT. § 27-10-120(1)(b) (1982).

376. See, e.g., OHIO REV. CODE ANN. § 5122.31 (Anderson 1981).

377. See, e.g., TENN. CODE ANN. § 33-3-111 (Supp. 1986).

378. See, e.g., UTAH CODE ANN. § 64-7-48(5) (1986).

379. See *supra* note 358.

380. See, e.g., WIS. STAT. ANN. § 51.61(5)(a).

381. See, e.g., MO. ANN. STAT. § 630.110(3) (Vernon Supp. 1986).

382. See, e.g., S.C. CODE ANN. § 44-23-1030. This statute, and others like it, see *Survey I*, *supra* note 321, at 194-96, provide only that a patient has a right to communicate with "his counsel." See, e.g., S.C. CODE ANN. §§ 43-33-310 to -400 (establishing the South Carolina Protection and Advocacy System for the Handicapped, Inc.); *id.* § 43-33-350(1) (system shall protect and advocate for the rights of developmentally disabled persons by "pursuing legal . . . remedies to insure the protection of the rights of such persons").

383. See, e.g., ALASKA STAT. § 47.30.840(a)(11) (1984).

384. See, e.g., N.Y. MENTAL HYG. LAW § 33.01 (McKinney 1978).

385. See, e.g., OR. REV. STAT. § 426.385(1)(d).

pensated for work done,³⁸⁶ to not be barred from registering to vote because of institutional status,³⁸⁷ to physical exercise and outdoor recreation,³⁸⁸ to a nourishing diet,³⁸⁹ and to reasonable visitation from members of the opposite sex.³⁹⁰

It must be stressed that these statutes were neither all-encompassing nor uniform. As recently as 1982, only five states were found to be in substantial compliance with the bills of rights recommendations of the Task Force on Legal and Ethical Issues of the President's Commission on Mental Health.³⁹¹ Also, the assumption made by several senators during the debate on the federal Mental Health Systems Act³⁹²—that thirty-five states had adequately comprehensive bills of rights protections³⁹³—was flatly erroneous.³⁹⁴ On the other hand, while this figure was clearly "inflated,"³⁹⁵ the statutes referred to³⁹⁶ reveal that—to some extent, at least—state legislatures were beginning to respond to the moral imperative of cases such as *Wyatt*.

D. Impact of the President's Commission's Report

When the Task Force on Legal and Ethical Issues of the President's Commission on Mental Health submitted its final report in 1978, it stressed the importance of state-level patients' bills of rights as a major tool "to help to ensure 'equal access to justice' for mentally handicapped persons."³⁹⁷ Invoking Judge Frank Johnson's "seminal" decision in *Wyatt v. Stickney*,³⁹⁸ it lauded those states which had at that time codified "the outlines of a constitutional right to protection of bodily integrity

386. See, e.g., NEB. REV. STAT. § 83-1066(7) (1981).

387. See, e.g., N.J. STAT. ANN. § 30:4-24.29(a).

388. See, e.g., N.D. CENT. CODE § 25-03.1-40(8) (1978).

389. See, e.g., MO. ANN. STAT. § 630.115.1(13).

390. See, e.g., KAN. STAT. ANN. § 59-2929(a)(3).

391. See generally *supra* note 321.

392. 42 U.S.C. § 9501 (1983); see *infra* notes 397-422 and accompanying text.

393. *Survey I*, *supra* note 321, at 178.

394. *Id.* at 179-80.

395. *Id.* at 180.

396. See *id.* at 185-201.

397. See *Mental Health and Human Rights: Report of the Task Panel on Legal and Ethical Issues*, 20 ARIZ. L. REV. 49 (1978) [hereinafter *Mental Health and Human Rights*].

398. For an analysis of the Commission's work while in progress, see *Special Report: The President's Commission on Mental Health: Assessing the Needs of the Nation*, 28 HOSP. & COMMUNITY PSYCHIATRY 677 (1977).

399. 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341 (M.D. Ala. 1971) (later opinion), 344 F. Supp. 373 (M.D. Ala. 1971) (later opinion), 344 F. Supp. 387 (M.D. Ala. 1972) (later proceeding), *aff'd in part and remanded in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

from unwanted State intrusion.”³⁹⁹

The need for such legislation, the Task Force noted, “should be self-evident”:⁴⁰⁰ “The extent of discrimination against mentally handicapped persons needs no lengthy recitation. The pattern of abuse, disenfranchisement, and disregard eloquently underscores the need for vigorous, enforceable, prophylactic legislation in each of the States.”⁴⁰¹ Such legislation would not “consign[] the mentally handicapped to second-class citizen status,” but would acknowledge the fact that “such persons have been perceived and treated as second-class citizens—or worse—by much of society.”⁴⁰²

The Task Force considered the array of pre-existing state statutes,⁴⁰³ and recommended that each state adopt legislation which would include at least seven basic components:

(a) A statement that all mentally handicapped persons are entitled to the specified rights;

(b) A statement that rights cannot be abridged solely because of a person’s handicap or because s/he is being treated (whether voluntarily or involuntarily);

(c) A declaration of the right to treatment, the right to refuse treatment and the regulation of treatment, the right to privacy and dignity, the right to a humane physical and psychological environment and the right to the least restrictive alternative setting for treatment;

(d) A statement of other, enumerated fundamental rights which may not be abridged or limited;

(e) A statement of other, specified rights which may be altered or limited only under specific, limited circumstances;

(f) An enforcement provision; and

(g) A statement that handicapped persons retain the right to enforce their rights through *habeas corpus* and all other common law or statutory remedies.⁴⁰⁴

The President’s Commission generally endorsed its Task Panel’s

399. *Mental Health and Human Rights*, *supra* note 397, at 133-34 (quoting, in part, *Developments—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1345 (1974)).

400. *Mental Health and Human Rights*, *supra* note 397, at 134.

401. *Mental Health and Human Rights*, *supra* note 397, at 134.

402. *Mental Health and Human Rights*, *supra* note 397, at 134; see also Wald, *Basic Personal & Civil Rights*, in *THE MENTALLY RETARDED CITIZEN AND THE LAW* 3, 18 (M. Kindred ed. 1976) (handicapped person perceived as “someone to whom attention need not be paid.”).

403. See, e.g., *Mental Health and Human Rights*, *supra* note 397, at 134 n.197.

404. *Mental Health and Human Rights*, *supra* note 397, at 134.

suggestions stating that, as there were "strong legal, ethical, and social policy reasons for adopting the principles of a right to receive treatment, a right to receive treatment in the least restrictive setting, and a right to refuse treatment,"⁴⁰⁵ it recommended that "[e]ach State review its mental health laws and revise them, if necessary, to ensure that they provide for" such rights,⁴⁰⁶ along with "a right to due process when community placement is being considered."⁴⁰⁷

"To articulate these . . . rights," the Commission recommended that "[e]ach State have a 'Bill of Rights' for all mentally disabled persons, wherever they reside."⁴⁰⁸ It added that such a bill should include the same seven components that the Task Force had listed earlier.⁴⁰⁹

The bill that was ultimately enacted by Congress—the Mental Health Systems Act of 1980 (MHSA)⁴¹⁰—included a bill of rights that was merely a recommendation rather than an enforceable enactment of rights.⁴¹¹ A survey done soon after enactment showed that, contrary to Congress' belief that at least thirty-five states already had enacted comprehensive protective statutes,⁴¹² only *five* states had actually complied with as many as half of the Act's recommendations,⁴¹³ while just twenty-two substantially complied with one-third.⁴¹⁴ Significantly, the greatest degree of compliance was found in areas not directly related to treatment, *e.g.*, visitation (forty-two states) and confidentiality of records (forty-six states),⁴¹⁵ while the right to a humane treatment environment and the least restrictive alternative for treatment each were clearly stipu-

405. 1 PRESIDENT'S COMMISSION ON MENTAL HEALTH, REPORT TO THE PRESIDENT 43 (1978).

406. *Id.* at 44. The Commission added one caveat. In recommending the inclusion of a statutory section providing for a right to refuse treatment, it added language specifying that states pay "careful attention to the circumstances and procedures under which the right may be qualified." *Id.*

407. *Id.*

408. *Id.*

409. *Id.* at 72 n.45.

410. 42 U.S.C. §§ 9401-9522 (1983).

411. See 42 U.S.C. § 9501 which provides:

It is the sense of the Congress that each State should review and revise, if necessary, its laws to ensure that mental health patients receive the protection and services they require; and in making such review and revision should take into account the recommendations of the President's Commission on Mental Health and: [42 U.S.C. § 9501(1)-(4)(c)].

42 U.S.C. § 9501. See generally, *Survey I*, *supra* note 321, at 178; see also *Survey II*, *supra* note 321.

412. *Survey I*, *supra* note 321, at 178; see *Survey II*, *supra* note 321, at 153 n.4 (citing remarks by Senators Morgan, Hatch, Danforth, Javits and Roth).

413. *Survey I*, *supra* note 321, at 179 (Alaska, Hawaii, Illinois, Montana and New York).

414. *Id.*

415. *Id.*

lated in only nineteen states.⁴¹⁶

In the five years after the MHSA was passed, thirteen states made at least some substantive amendments to their patients' rights acts so as to provide some of the protections recommended in the federal act.⁴¹⁷ Of these states, only one, Hawaii, made such changes which provided patients with "virtually all the rights recommended in the MHSA."⁴¹⁸ Interestingly, of all the states where changes were made, only in Hawaii did officials indicate that the passage of the MHSA substantially influenced the new laws.⁴¹⁹ According to that state's Mental Health Association, the legislative revision was based "entirely" on the MHSA, which served as a "catalyst" to initiate statutory review.⁴²⁰

Notwithstanding this lack of direct causation, the commentators who have studied this issue most closely have concluded that MHSA's Bill of Rights was nevertheless important "as a step in legitimatizing the very idea of rights for those who receive mental health services."⁴²¹ They note that the Act's content "may have had influence on practice, legal advice, regulations or court decisions, even if it was not incorporated in state statutes."⁴²²

416. *Id.*

417. *Survey II*, *supra* note 321, at 147. In at least one state (Illinois), statutory review was abandoned because of the advisory-only language in the Mental Health Systems Act (MHSA). *Id.*

418. *Id.*; see also *id.* at 151 (discussing post-1980 changes in the state laws of Hawaii, Kentucky, Maryland and Mississippi, the only states felt to have made "extensive changes" in the interim five years).

419. *Id.* at 147. Officials in at least four states—Alabama, Louisiana, Massachusetts and Utah—indicated that court decisions were the key factor spurring legislative change. *Id.*

420. *Id.* (emphasis in original).

421. *Id.* at 153. For a more pessimistic reading, see *Federal Bill of Rights Has Little Impact on the States*, 36 HOSP. & COMMUNITY PSYCHIATRY 1008 (1985).

422. *Survey II*, *supra* note 321, at 153. The Act itself has not been cited extensively. See *Foy v. Greenblott*, 141 Cal. App. 3d 1, 10 n.2, 190 Cal. Rptr. 84, 90 n.2 (1983) ("Congress has also declared that all state mental health programs should provide treatment in the least restrictive environment" (citing 42 U.S.C. § 9501(1)(A),(F),(G),(J))); *Rennie v. Klein*, 653 F.2d 836, 852 n.17 (3d Cir. 1981) (en banc), *vacated*, 458 U.S. 1119 (1982) (comparing § 9501 to New Jersey's Administrative Bulletin 78-3, and concluding that New Jersey has "anticipated and accommodated virtually all of the concerns expressed in the [MHSA]").

In their comprehensive analysis of the creation of the MHSA, Professors Levine and Lyon-Levine conclude:

If the states do not guarantee the rights specified in the MHSA, as Congress has said it expects, we can see what will happen when the political pendulum predictably swings back some day to a more activist Congress. The MHSA rights, along with those of *Pennhurst*, will no doubt return to the Congressional agenda for effective enforcement. . . .

In order for rights protection to remain a strong contender, its proponents must learn the lessons of this history. If they do, rights protection for consumers of mental health services—bills of rights and advocacy—is no dead horse.

Levine & Lyon-Levine, *supra* note 321, at 58.

E. Substantive Patients' Rights Under State Statutes

Litigation⁴²³ under state-level patients' bills of rights⁴²⁴ has focused predominantly on the same substantive rights which have been at the center of the major constitutional litigation which has developed over the past decade: the right to treatment, the right to refuse treatment, institutional rights and the right to deinstitutionalization and/or community services.

Although some courts⁴²⁵ have appeared reluctant to construe such statutes more expansively than the United States Supreme Court has read the Constitution in such cases as *Youngberg v. Romeo*⁴²⁶ and *Mills v. Rogers*,⁴²⁷ others have explicitly articulated a broader reading of state law.⁴²⁸ While no clear trends emerge from these conflicting modes of interpretation, it is clear that, in some states at least, the Supreme Court's modest statements of the breadth of the right to treatment⁴²⁹ and the right to refuse treatment⁴³⁰ will not bar innovative and wide-ranging state statutory decisions.

1. The right to treatment

a. before Youngberg

Prior to the Supreme Court's decision in *Youngberg*, several courts read relevant state statutes to create enforceable rights to treatment and to provide habilitation for the institutionalized mentally disabled.⁴³¹

423. Courts in nearly every state have, of course, construed their commitment laws to determine the appropriate procedural and substantive due process safeguards applicable in the civil commitment process. These issues are generally beyond the scope of this Article. See e.g., *In re Hop*, 29 Cal. 3d 82, 623 P.2d 282, 171 Cal. Rptr. 721 (1981) (applying right to jury trial, proof beyond a reasonable doubt standard and appointment of counsel to case of developmentally disabled person institutionalized at state hospital); *North Dakota State Hosp. v. Palmer*, 363 N.W.2d 401 (N.D. 1985) (determining adequacy of outpatient treatment); cf. *Association of Bds. of Visitors v. Prevost*, 98 A.D.2d 260, 471 N.Y.S.2d 342 (App. Div. 1983) (Boards of Visitors of state facilities for the mentally disabled lacked, under state law, standing to sue to compel state watchdog agency to provide counsel to investigate complaints of patient abuse at state hospital).

424. See *supra* notes 320-422 and accompanying text.

425. See *Dixon Ass'n for Retarded Citizens v. Thompson*, 91 Ill. 2d 518, 440 N.E.2d 117 (1982); see also *County of San Diego v. Fadley*, 159 Cal. App. 3d 440, 441-47, 205 Cal. Rptr. 572, 573-76 (1984).

426. 457 U.S. 307 (1982).

427. 457 U.S. 291 (1982).

428. See *infra* notes 473-585 and accompanying text.

429. See Perlin, *supra* note 74, at 5.

430. See *id.* at 6-7.

431. See, e.g., *Rone v. Fireman*, 473 F. Supp. 92 (N.D. Ohio 1979); *Chasse v. Banas*, 119 N.H. 93, 399 A.2d 608 (1979); *New Jersey Ass'n for Retarded Citizens, Inc. v. New Jersey Dep't of Human Servs.*, 89 N.J. 234, 445 A.2d 704 (1982); *E.H. v. Matin*, 168 W. Va. 248, 284

Thus, in *E.H. v. Matin*,⁴³² the West Virginia Supreme Court of Appeals interpreted that state's bill of rights⁴³³ as the legislature's "acknowledg[ment of] its concern for both humane conditions of custody and effective therapeutic treatment" in "conformity with the highest possible standards of moral rectitude";⁴³⁴ in enforcing this right, the court was not being asked to "impose a new constitutional standard upon a reluctant and unwilling state [but] rather, . . . only to order the executive branch to fulfill its obligation under *clear and unambiguous* statutory provisions."⁴³⁵

The legislature, the court reasoned, could not have passed the pertinent provisions of the mental health code "for any reason other than to establish rights in mental patients" and a corresponding duty upon the state.⁴³⁶ If patients could not seek enforcement of these rights in the courts, "both right and duty evaporate in any meaningful sense and the entire *Code* provision becomes either a joke or an exercise in irony."⁴³⁷ The court could not "infer that either was the intent of our Legislature."⁴³⁸

S.E.2d 232 (1981). *But see* United States v. Ecker, 543 F.2d 178 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977); Santori v. Fong, 484 F. Supp. 1029 (E.D. Pa. 1980).

432. 168 W. Va. 248, 284 S.E.2d 232 (1981).

433. W. VA. CODE § 27-5-9 (1986).

434. *E.H.*, 168 W. Va. at 257, 284 S.E.2d at 237.

435. *Id.* (emphasis added). The statute in question reads, in pertinent part:

(b) Each patient of a mental health facility receiving services therefrom shall receive care and treatment that is suited to his needs and administered in a skillful, safe and humane manner with full respect for his dignity and personal integrity.

(c) Every patient shall have the following rights regardless of adjudication of incompetency:

- (1) Treatment by trained personnel;
- (2) Careful and periodic psychiatric reevaluation no less frequently than once every three months;
- (3) Periodic physical examination by a physician no less frequently than once every six months; and
- (4) Treatment based on appropriate examination and diagnosis by a staff member operating within the scope of his professional license.

W. VA. CODE § 27-5-9(b)-(c).

The court characterized the trial record as reflecting the "Dickensian squalor of unconscionable magnitudes," finding that patients received "woefully inadequate treatment and that the conditions of their hospitalization are such as to shock the conscience of any civilized society solicitous of the welfare of its unfortunate and disadvantaged members." *E.H.*, 168 W. Va. at 249, 284 S.E.2d at 232-33, 236 (quoting *State ex rel. Hawks v. Lazaro*, 157 W. Va. 417, 432, 202 S.E.2d 109, 120 (1974)). In addition, the court made special reference to the "Kafkaesque lack of [staff] coordination." *Id.* at 255, 284 S.E.2d at 236. The court saw the facts before it as "symbols of a pervasive, systemic inadequacy of our mental health hospitals the entire length and breadth of West Virginia." *Id.* at 258, 284 S.E.2d at 237.

436. *E.H.*, 168 W. Va. at 261, 284 S.E.2d at 239.

437. *Id.*

438. *Id.*

Against this backdrop, the court enumerated its specific holdings:

(1) [The state statutory provision] creates specific enforceable rights in the entire inmate population of the State's mental hospitals. (2) [The state statutory provision] requires a system of custody and treatment which will reflect the competent application of current, available scientific knowledge. Where there is a good faith difference of opinion among equally competent professional experts concerning appropriate methods of treatment and custody, such differences should be resolved by the director of the . . . Department of Health and not by the courts. (3) It is the obligation of the State to provide the resources necessary to accord inmates of mental institutions the rights which the State has granted them under [the state statute].⁴³⁹

The case had been brought as a mandamus action pursuant to the state supreme court's powers of original jurisdiction.⁴⁴⁰ The *E.H.* court transferred the action to a county circuit court for purposes of developing an appropriate remedy.⁴⁴¹

Similarly, in *Chasse v. Banas*,⁴⁴² the New Hampshire Supreme Court viewed the state legislature's enactment of a patient's bill of rights⁴⁴³ as having created a right for involuntarily committed patients "and concomitantly impose[d] a duty upon employees of the State hospital to provide adequate and humane treatment."⁴⁴⁴ By enacting the law,

439. *Id.* at 259-60, 284 S.E.2d at 238. On the question of the financial implications of its decision, the court responded that the "definitive answer" was provided in *Wyatt v. Aderholt*:

"It goes without saying that state legislatures are ordinarily free to choose among various social services competing for legislative attention and state funds. But that does not mean that a state legislature is free, for budgetary or any other reasons, to provide a social service in a manner which will result in the denial of individuals' constitutional rights. And it is the essence of our holding that the provision of treatment to those the state has involuntarily confined in mental hospitals is necessary to make the state's actions in confining and continuing to confine those individuals constitutional. That being the case, the state may not fail to provide treatment for budgetary reasons alone."

E.H., 168 W. Va. at 260 n.2, 284 S.E.2d at 238 n.2 (quoting *Wyatt v. Aderholt*, 503 F.2d 1305, 1314-15 (5th Cir. 1974)). Although the *E.H.* court did not reach the issue of whether an involuntarily confined patient had a right to treatment, it noted that "a growing number of courts have . . . recognized such a right." *Id.*

440. *See* W. VA. CODE § 53-1-1 (1981).

441. *E.H.*, 168 W. Va. at 259, 284 S.E.2d at 238. The court additionally ordered that defendants submit a plan to the circuit court through which the statutory rights in question "will be accorded to every patient in mental health institutions maintained by the State of West Virginia." *Id.* at 261, 284 S.E.2d at 239.

442. 119 N.H. 93, 399 A.2d 608 (1979).

443. *See* N.H. REV. STAT. ANN. § 135-B:43 (1973) (repealed 1986).

444. *Chasse*, 119 N.H. at 96, 399 A.2d at 610. "The existence of a statutory right implies

the court reasoned, "the legislature ha[d] done more than enunciate general objectives and goals" in "recogniz[ing] civil rights of the mentally disabled who are confined in State institutions."⁴⁴⁵ If a patient were denied the right to legal action to enforce the created rights, "the legislature's guarantee of adequate treatment [would] be an empty promise."⁴⁴⁶

Elsewhere, in *Rone v. Fireman*,⁴⁴⁷ a federal district court declined to apply federal constitutional standards in an institutional conditions case, finding that an Ohio state statute⁴⁴⁸ created judicially enforceable rights⁴⁴⁹ against which the record would be measured.⁴⁵⁰ The court found that the state law set forth "detailed and extensive treatment requirements,"⁴⁵¹ and that its role was to "further define and determine adequate treatment by interpreting the applicable [state] statute."⁴⁵²

the existence of all necessary and appropriate remedies.' " *Id.* (quoting *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969)).

445. *Id.* at 96, 399 A.2d at 610.

446. *Id.* at 97, 399 A.2d at 610. Subsequently, in *State v. Brosseau*, 124 N.H. 184, 470 A.2d 869 (1983), the New Hampshire Supreme Court held that the state legislature, by enacting statutes providing mentally disabled institutionalized persons with the right to adequate treatment, waived any claim of sovereign immunity in a state court damages action, but did not waive its eleventh amendment immunity in federal court. *Id.* at 191-92, 470 A.2d at 873-74. See generally *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). See also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (eleventh amendment prohibits private individual from suing state for damages in federal court for alleged violations of § 504 of the Rehabilitation Act of 1973) (legislatively overruled by the 1986 Rehabilitation Act amendments); *supra* notes 38-40 and accompanying text.

447. 473 F. Supp. 92 (N.D. Ohio 1979).

448. OHIO REV. CODE ANN. § 5122.27 (Baldwin 1971). In pertinent part, the statute in question reads:

The head of the hospital . . . shall assure that all patients . . . shall:

. . . .

(B) Have a written treatment plan consistent with the evaluation, diagnosis, prognosis, and goals . . . ;

(C) Receive treatment consistent with the treatment plan. The department of mental health shall set standards for treatment provided to such patients, consistent wherever possible with standards set by the joint commission on accreditation of hospitals;

(D) Receive periodic reevaluations of the treatment plan by the professional staff of the hospital at intervals not to exceed ninety days;

(E) Be provided with adequate medical treatment for physical disease or injury;

(F) Receive humane care and treatment, including without limitation, the following:

. . . .

(3) A humane psychological and physical environment within the hospital facilities

Id.

449. But see *Pennhurst II*, 465 U.S. 89 (1984).

450. *Rone*, 473 F. Supp. at 119-20.

451. *Id.* at 120.

452. *Id.*

The court then analyzed "seven basic treatment rights"⁴⁵³ contained in the state law, and found, *inter alia*, that the defendants had failed to develop adequate and individualized treatment programs.⁴⁵⁴ The court determined that in one specific hospital unit,⁴⁵⁵ the defendants failed to maintain a "humane and therapeutic environment,"⁴⁵⁶ and that the hospital staff was not "sufficiently qualified nor provided sufficient training and education to provide minimally adequate humane care and treatment."⁴⁵⁷ To remedy these violations, the court entered a broad remedial order "to assure all patients at [the state hospital] the treatment required by the law of Ohio."⁴⁵⁸

Finally, in *New Jersey Association for Retarded Citizens, Inc. v. New Jersey Department of Human Services*,⁴⁵⁹ the New Jersey Supreme Court broadly interpreted a state statute providing the right of habilitation to developmentally disabled persons.⁴⁶⁰ The court ruled that the state was required to provide *each* resident of a state school for the retarded with "specialized"⁴⁶¹ and "comprehensive . . . services,"⁴⁶² including "treatment, education, training, rehabilitation, care and protection"⁴⁶³ in order to "alleviate the residents' disabilities and promote their social, personal, physical and economic habilitation."⁴⁶⁴ The court specifically rejected defendants' argument that the law merely obligated them to make certain services generally available at a facility "without imposing a duty on them to provide each individual resident with these services."⁴⁶⁵ The court responded:

We conclude that the Legislature did not merely intend these services to be generally available at the facility. The import of these statutes is clear. [The state school] does not have

453. *Id.* at 121 (footnote omitted).

454. *Id.*

455. *Id.*

456. *Id.* at 122.

457. *Id.* at 123.

458. *Id.* at 133. *See generally id.* at 133-35.

459. 89 N.J. 234, 445 A.2d 704 (1982).

460. *Id.* at 247-50, 445 A.2d at 710-12; *see also* N.J. STAT. ANN. 30:6D-1 to -12 (West 1981 & Supp. 1986).

461. N.J. STAT. ANN. § 30:6D-2 to 30:6D-3b (West 1981).

462. N.J. STAT. ANN. § 30:4-165.1.

463. N.J. STAT. ANN. § 30:4-165.2 (2).

464. *Retarded Citizens, Inc.*, 89 N.J. at 248, 445 A.2d at 711 (paraphrasing N.J. STAT. ANN. § 30:6D-3(b), 6D-9 (West 1977) (amended 1981)).

The court noted that, due to the presence of adequate state statutory grounds, it was not necessary to reach plaintiffs' federal statutory or constitutional claims. *Id.* at 244 n.5, 445 A.2d at 708 n.5.

465. *Id.* at 247, 445 A.2d at 710.

the freedom to choose which of its residents will receive services and which will not. Every individual at [the state school] is entitled to these special services not only because it is morally right and just, although it is both those things. They are entitled to them because it is the law.⁴⁶⁶

On the other hand, in at least two cases, state statutory grants have been construed narrowly. In *United States v. Ecker*,⁴⁶⁷ the Court of Appeals for the District of Columbia interpreted the District's local law⁴⁶⁸ to allow a facility to withhold certain forms of treatment if its benefits are outweighed by the potential harm to others.⁴⁶⁹ A Pennsylvania district court, in *Santori v. Fong*,⁴⁷⁰ read that state's pertinent statutes⁴⁷¹ as "a mere statement of policy, [which,] without more, will not rise to the level of a constitutionally protected interest in property or liberty, because neither an affirmative duty nor a specific right is created."⁴⁷²

b. since Youngberg

In *Youngberg*, the Supreme Court found that involuntarily confined mentally retarded persons were entitled under the fourteenth amendment's liberty clause to such "minimally adequate or reasonable training to ensure safety and freedom from undue restraint."⁴⁷³ In balancing liberty interests against relevant state interests, courts must determine

466. *Id.* at 249, 445 A.2d at 711. An Indiana court found a right to treatment under the federal DD Act. The court cited the counterpart state statute and noted that "both our federal and state legislatures have entrusted our courts with the responsibility of enforcing the rights of the developmentally disabled by requiring a judicial determination of whether a statutory minimum level of treatment is being afforded." *In re Ackerman*, 409 N.E.2d 1211, 1221-22 (Ind. Ct. App. 1980); *cf. Halderman v. Pennhurst State School & Hosp.*, 451 U.S. 1 (1981). See *supra* text accompanying notes 87-92 for a discussion of this case.

467. 543 F.2d 178 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977).

468. See D.C. CODE ANN. § 24-301(d)(1) (1981) (governing treatment of persons found not guilty by reason of insanity); *cf. Jones v. United States*, 463 U.S. 354 (1983).

469. *Ecker*, 543 F.2d at 199-200; *see also Bowman v. Wilson*, 672 F.2d 1145, 1155 n.21 (3d Cir. 1982) (construing District of Columbia law).

470. 484 F. Supp. 1029 (E.D. Pa. 1980).

471. See PA. STAT. ANN. tit. 50, §§ 7101-7116 (Purdon Supp. 1986). Under the Pennsylvania statute, "[i]t is the policy of the Commonwealth of Pennsylvania to seek to assure the availability of adequate treatment to persons who are mentally ill, . . . and in every case, the least restrictions consistent with adequate treatment shall be employed." *Id.* § 7102. The statute defines adequate treatment as "a course of treatment designed and administered to alleviate a person's pain and distress and to maximize the probability of his recovery from mental illness." *Id.* § 7104.

472. *Santori*, 484 F. Supp. at 1031; *see also Commonwealth v. Jones*, 514 S.W.2d 690 (Ky. 1974) (statute providing patients with right to humane care and treatment not penal in nature; dismissal of criminal indictment affirmed); *cf. In re McMullins*, 315 Pa. Super. 531, 538-43, 462 A.2d 718, 722-23 (1983).

473. 457 U.S. at 319.

whether professional judgment has been exercised.⁴⁷⁴ A professional's decision in such cases is "presumptively valid,"⁴⁷⁵ and "liability may be imposed only when the decision . . . is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."⁴⁷⁶

While the question has been raised concerning the continued *constitutional* vitality of *Wyatt* after *Youngberg*,⁴⁷⁷ commentators apparently have not extensively considered *Youngberg's* impact on the construction of state *statutory* rights.⁴⁷⁸ A review of several pertinent cases reveals that most⁴⁷⁹ courts have continued to read relevant state statutes broadly even in the aftermath of *Youngberg*.⁴⁸⁰

474. *Id.* at 321.

475. *Id.* at 323. "Professional" is defined at *id.* n.30.

476. *Id.* at 323.

477. *See, e.g., Williams v. Wallis*, 734 F.2d 1434, 1437 n.2 (11th Cir. 1984) ("Alabama attempts to meet the guidelines of *Wyatt* . . . in treating and releasing insanity acquittees."). *See generally Woe v. Cuomo*, 729 F.2d 96, 104 n.7 (2d Cir.), *cert. denied*, 469 U.S. 936 (1984) ("It is unclear to what extent [the *Wyatt* approach] retains vitality in light of . . . *Youngberg*.").

For other recent constitutional cases decided by federal courts construing *Youngberg* and subsequent cases, *see, e.g., Clark v. Cohen*, 794 F.2d 79, 87 (3d Cir.), *cert. denied*, 107 S. Ct. 459 (1986); *Thomas S. v. Morrow*, 781 F.2d 367, 374-76 (4th Cir.), *cert. denied*, 106 S. Ct. 1992 (1986) and 107 S. Ct. 235 (1986); *Armstead v. Pingree*, 629 F. Supp. 273, 276 (M.D. Fla. 1986); *Kolpak v. Bell*, 619 F. Supp. 359, 376-80 (N.D. Ill. 1985); *Doe by Roe v. Gaughan*, 617 F. Supp. 1477, 1486-87 (D. Mass. 1985).

478. *But see Note, Protecting Liberty Interests: Developments in Vermont's Mental Health Law as Federal Constitutional Protection Declines*, 9 VT. L. REV. 265 (1984).

479. *But see Dixon Ass'n for Retarded Citizens v. Thompson*, 91 Ill. 2d 518, 440 N.E.2d 117 (1982). *See infra* text accompanying notes 505-15 for a discussion of this case.

480. *See* cases discussed *supra* text accompanying note 479 and *infra* text accompanying notes 478-504; *see also Marshall v. Kort*, 690 P.2d 219, 221 (Colo. 1984) (habeas corpus petitioner, committed following finding of not guilty by reason of insanity, entitled to determination of legality of confinement, at which he can raise question of "remedy that addresses appropriate treatment short of immediate release"); *cf. In re D.J.M.*, 158 N.J. Super. 497, 500-02, 386 A.2d 870, 871-73 (1978) (although there is "no dispute" as to existence of statutory right to treatment, question of quality of medical care generally not cognizable at "routine review" of civil commitment; if patient wishes to raise treatment questions, counsel must give prior notice to court and opposing counsel, and, if funding is involved, to the appropriate public official charged with overseeing such funding); *Bezio v. New York State Office of Mental Retardation and Developmental Disabilities*, 95 A.D.2d 135, 466 N.Y.S.2d 804 (App. Div. 1983) (statute directing state-created patient advocacy service to review suitability of mentally retarded residents remaining in voluntary institutional status does not provide opportunity for resident to challenge appropriateness of treatment; such challenge must be raised in collateral civil proceeding); *Ford v. Civil Serv. Employees Ass'n*, 94 A.D.2d 262, 265, 464 N.Y.S.2d 481, 483 (App. Div. 1983) (in investigation of allegations that employee of state hospital sexually abused patient, the State's duty extends beyond basic rights secured by the United States Constitution).

Thus, where a district court⁴⁸¹ had ordered⁴⁸² the preparation of a program by which the institutional population of a state school for the developmentally disabled would be reduced by 200 residents,⁴⁸³ state officials sought to have the injunction vacated on the grounds that *Youngberg* was limited by its own terms to the involuntarily committed.⁴⁸⁴ These officials argued that since a significant number of the residents in the case before the court were voluntary admittees, they "[did] not enjoy similar constitutional protection[s]."⁴⁸⁵

The Eighth Circuit, in *Association for Retarded Citizens v. Olson*, rejected this argument on the basis of North Dakota state law which "grants a right to treatment to *all* developmentally disabled persons."⁴⁸⁶ The *Olson* court concluded that "because state law accords a panoply of rights to handicapped individuals and makes no distinction between the voluntarily and involuntarily committed, the State's contention that it has no duty to provide appropriate treatment, services and habilitation to involuntarily committed individuals in the least restrictive setting is with-

481. *Association for Retarded Citizens v. Olson*, 561 F. Supp. 473 (D.N.D. 1982), *aff'd in part, modified and remanded on other grounds*, 713 F.2d 1384 (8th Cir. 1983).

482. *Association for Retarded Citizens v. Olson*, 713 F.2d 1384, 1387 (8th Cir. 1983). The district court also ordered state defendants (1) to either place eligible plaintiffs in licensed or accredited aftercare facilities or to create community-based residential services meeting certain professional standards so that the population at a state school for the mentally retarded would be reduced to 450 over a five year period, and (2) to comply with all regulations promulgated pursuant to Title XIX of the Social Security Act at all facilities in which deinstitutionalized plaintiffs reside or will reside in the future. *Id.* at 1388-89.

483. *Id.* at 1391-92.

484. *Youngberg*, 457 U.S. at 309.

485. *Olson*, 713 F.2d at 1392.

Defendants also cited *Youngberg* in support of their position that "state legislatures are better suited to make difficult value judgments and resolve delicate issues of social problems than [are] federal courts." *Id.* at 1391. The court of appeals rejected this argument and found that the planned population reduction was "reasonable" and supported by professional testimony in the record, which revealed that only 10 to 200 developmentally disabled persons in North Dakota required institutionalization, a position with which state officials did not "differ significantly." *Id.* at 1392.

Also, the ordering of the development of a program could "hardly be classified as an unreasonable intrusion into professional judgment." *Id.* The court of appeals noted further that the district court had retained jurisdiction, and that, if the implementation of the program proved to be impossible, that court could make any subsequent necessary changes that "justice may require." *Id.* (citing *Maryland & Virginia Milk Producers Assoc. v. United States*, 362 U.S. 458, 473 (1960)).

486. *Olson*, 713 F.2d 1393 (emphasis in original); see N.D. CENT. CODE § 25-01.2-02 (Supp. 1981) ("All persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for those disabilities . . . [which] shall be provided in the least restrictive [alternative]."); see also N.D. CENT. CODE §§ 25-01.2-01(1), -01(3), -03 to -13. Cf. *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1245-46 (2d Cir. 1984). *Society for Good Will* is construed in *Armstead*, 629 F. Supp. at 276, and *Kolpak*, 619 F. Supp. at 378.

out merit."⁴⁸⁷

Elsewhere, in a case arising from an involuntary civil commitment appeal, the Vermont Supreme Court ordered a remand so that the trial court could consider plaintiff's argument that he was not receiving adequate and appropriate treatment.⁴⁸⁸ It squarely rejected the state's argument that the *Youngberg* standards control:

The issue, however, is not whether the constitutional minimum has been met, but whether the statutory mandate of "treatment which is adequate and appropriate to [the person's] condition" has been met. This mandate may require something more than the "reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests" which the Fourteenth Amendment requires.⁴⁸⁹

In *Chill v. Mississippi Hospital Reimbursement Commission*,⁴⁹⁰ a case focusing on the state's right to demand reimbursement from a patient's estate for that individual's care and maintenance at a state hospital, the Mississippi Supreme Court looked carefully at the recent

487. *Olson*, 713 F.2d at 1393. But see *Pennhurst II*, 465 U.S. 89 (1984) (eleventh amendment prohibits federal courts from ordering state officials to conform their conduct to state law); cf. *Clark*, 794 F.2d at 83-84 (rejecting defendants' eleventh amendment contentions).

488. *In re R.A.*, 146 Vt. 289, 501 A.2d 743, 744 (1985). Plaintiff, who suffered from Huntington's Chorea, a hereditary and degenerative neurological disease, had argued that he was "developmentally disabled" under the definition employed in federal law and was thus eligible for treatment in certain group home placements "adequate and appropriate to [his] condition" under state law. 501 A.2d at 743-44; see 42 U.S.C. § 6001 (7) (West Supp. 1986); VT. STAT. ANN. tit. 18, § 7617(e) (1985); cf. *In re Richard M.*, 127 N.H. 12, 497 A.2d 1200, 1204-06 (1985) (defining "developmentally disabled" under New Hampshire state law); see also N.H. REV. STAT. ANN. § 171-A:2 (Supp. 1983).

489. *R.A.*, 501 A.2d at 744 (citing *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982)); see also *In re W.H.*, 144 Vt. 595, 481 A.2d 22 (1984) (consideration of less restrictive alternatives required prior to involuntary hospitalization); *In re A.C.*, 144 Vt. 37, 470 A.2d 1191 (1984) (setting limits on ability of trial court to alter medication regime of institutionalized mentally disabled person). In analyzing these other post-*Youngberg* cases, a commentator has concluded:

Although [*Youngberg*] may be interpreted to support a constitutional right of freedom from involuntary confinement, its deferential standard of review could preclude active judicial enforcement of this right. [*Youngberg*] will undermine the activist role of the federal judiciary in mental health cases.

State statutory rights, often enacted to comply with what were considered constitutional requirements at the time, now offer a more promising basis for protection of the liberty interests of mental patients . . .

Note, *supra* note 478, at 286; cf. *In re V.C.*, 146 Vt. 454, 505 A.2d 1214, 1216-17 (1985) (while patient has enforceable state statutory right to adequate treatment, statute does not contemplate ordering state Commissioner of Mental Health to place patient in out-of-state facility); see VT. STAT. ANN. tit. 18 §§ 7617(b)(3), 7703(b) (Supp. 1986); see also *In re M.G.*, 137 Vt. 521, 408 A.2d 653 (1979) (pre-*Youngberg* case).

490. 429 So. 2d 574 (Miss. 1983).

"explosion of litigation"⁴⁹¹ regarding the substantive and procedural rights of the mentally disabled. The court noted that such rights "find their content" in two sources: (1) the "federal constitutional minimum," and (2) "higher or broader state created rights."⁴⁹² The court concluded that Mississippi's civil commitment law has "without doubt . . . vested rights in the mentally ill substantially in excess of those minimum protections required by the federal constitution."⁴⁹³

*Foy v. Greenblott*⁴⁹⁴ presented a unique damages action. An incompetent patient and her infant son sued the facility in which she was institutionalized and her institutional doctors on a "wrongful birth" theory. The plaintiff argued that her son's birth was due to defendants' negligence in failing to supervise her and/or to provide her with appropriate birth control devices or counseling in light of their awareness of her medical history of "irresponsible sexual behavior toward [others]."⁴⁹⁵ As part of her position, she asserted that "under no circumstances should a woman adjudicated as incompetent be permitted to bear a child."⁴⁹⁶

In rejecting this aspect of her claim,⁴⁹⁷ the court noted that, under state statute, institutionalized mental patients enjoy "the same legal rights and responsibilities guaranteed all other persons' except those specifically denied her by law,"⁴⁹⁸ including the "fundamental" right to "freedom from unwarranted governmental intrusion and to choose whether to bear children."⁴⁹⁹ In response to plaintiff's suggestion that she be subject to "extra supervision" so as to insure that she does not conceive,⁵⁰⁰ the court relied on the state patients' bill of rights as entitling every institutionalized person to "individualized treatment under the 'least restrictive' conditions feasible," so that "the institution should minimize interference with a patient's individual autonomy, including her

491. *Id.* at 582.

492. *Id.*

493. *Id.*

494. 141 Cal. App. 3d 1, 190 Cal. Rptr. 84 (1983).

495. *Id.* at 5, 190 Cal. Rptr. at 87.

496. *Id.* at 9, 190 Cal. Rptr. at 89-90.

497. The court of appeal allowed plaintiff to proceed only under the theory that defendants' failure to make contraceptive counseling and medication available to her was "possibly actionable." *Id.* at 13, 190 Cal. Rptr. at 92. Associate Justice Poche, in his concurring opinion, characterized plaintiffs' complaint as "an unfortunate, classic example of mushball pleading" and a "creature of obfuscation." *Id.* at 16, 190 Cal. Rptr. at 94.

498. *Id.* at 9, 190 Cal. Rptr. at 90 (quoting CAL. WELF. & INST. CODE §§ 5325.1, 5325, 5327 (West 1984)). The court stated that "[t]he courts and legislatures do not subscribe to [plaintiffs'] theory of eugenics." *Id.*

499. *Id.* (quoting *Maxon v. Superior Court*, 135 Cal. App. 3d 626, 632, 185 Cal. Rptr. 516, 520 (1982)).

500. *Id.* at 10, 190 Cal. Rptr. at 90.

personal 'privacy' and 'social interaction.'"⁵⁰¹ Effective hospital policing of all patients "would not only deprive them of the freedom to engage in consensual sexual relations, which they would enjoy outside the institution, but would also compromise the privacy and dignity of all residents."⁵⁰²

In a footnote, the court noted that numerous other courts had found a federal constitutional right to the least restrictive conditions of institutional treatment,⁵⁰³ but claimed that the Supreme Court had declined to rule on the question, citing *Youngberg v. Romeo*.⁵⁰⁴ The *Foy* court appeared to interpret,⁵⁰⁵ however, the "reasonably non-restrictive confinement conditions" constitutionally mandated by *Youngberg*⁵⁰⁶ to include "suitable opportunities for the patient's interaction with members of the opposite sex" as among the "minimum constitutional standards for adequate treatment."⁵⁰⁷

On the other hand, in a suit brought to enjoin the implementation of a plan to close a state residential facility for the mentally retarded, the Illinois Supreme Court, in *Dixon Association for Retarded Citizens v. Thompson*,⁵⁰⁸ disposed of the issue by simply finding that "the statutory rights granted [to institutionalized developmentally disabled persons] under the [state] Code⁵⁰⁹ are more expansive than and include the constitutional rights of the [facility] residents,"⁵¹⁰ citing *Youngberg*.⁵¹¹ After reading *in pari materia* three statutory sections of the state bill of rights

501. *Id.* (quoting, CAL. WELF. & INST. CODE §§ 5325.1(a), (b), (g), 5358(a), (c) (West 1984)).

502. *Id.* at 10, 190 Cal. Rptr. at 91.

503. *Id.* at 10 n.2, 190 Cal. Rptr. at 90-91 n.2 (citing *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub. nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974)).

504. *Id.* (citing *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982)).

505. The footnote in which this issue is discussed is ambiguous. It notes that the Supreme Court has not ruled on the right to treatment in the least restrictive alternative, that it *has* mandated "reasonably non-restrictive confinement conditions" (citing *Youngberg*), and that "one such least restrictive treatment case" provides, as a minimum constitutional standard for treatment, opportunities for social interactions with the opposite sex. *Id.*

506. See *Youngberg*, 457 U.S. at 324; see also *In re Thompson*, 394 Mass. 502, 476 N.E.2d 216, 219 (1985) (construing the "reasonably non-restrictive confinement conditions" language of *Youngberg*).

507. *Foy*, 141 Cal. App. 3d at 10 n.2, 190 Cal. Rptr. at 91 n.2 (citing *Wyatt v. Stickney*, 344 F. Supp. 373, 379-81 (1972)).

508. 91 Ill. 2d 518, 522, 440 N.E.2d 117, 119 (1982).

509. See ILL. REV. STAT. ch. 91 1/2, § 2-100 (1985 Supp.) ("No recipient of services shall be deprived of any rights, benefits or privileges guaranteed by law, the Constitution of the State of Illinois, or the Constitution of the United States solely on account of the receipt of such services.").

510. *Dixon*, 91 Ill. 2d at 523, 440 N.E.2d at 119 (citing *Youngberg v. Romeo*, 457 U.S. 307 (1982)).

511. *Id.*

for institutionalized persons,⁵¹² the court concluded that, under the code, "adequate and humane care and service would seem to include the care or service encompassed within the definition of 'habilitation.'" ⁵¹³ For such care or services to be "adequate," they would also have to conform to another Code provision that no service recipient may be denied any rights guaranteed by the state or federal constitution.⁵¹⁴ The court then turned to *Youngberg* and determined that the rights declared there by the Supreme Court "essentially overlap the rights conferred by [state law]." ⁵¹⁵ On the merits of the case, the court found that, before the facility in question had been ordered to be closed, there was "detailed, considered planning," ⁵¹⁶ and that the relocation program in question was designed by professionals who "had exercised their professional judgment." ⁵¹⁷

Although certain other professionals disagreed with the decisions made, the court declined to interfere because the program ultimately designed was not "'such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person[s] responsible actually did not base the decision' on their professional judgment." ⁵¹⁸ Thus, with the exception of *Dixon*, the Illinois case, most state courts have been willing to interpret state patients' rights laws expansively in light of (or, perhaps, in *spite* of) the Supreme Court's cautionary language as to professional deference and institutional decisionmaking in *Youngberg*.

512. See ILL. REV. STAT. ch. 91 1/2, § 2-102(a) (1985); *id.* ch. 91 1/2, §§ 1-111, 1-115 (1981). These statutes are discussed in *Dixon*, 91 Ill. 2d at 529, 440 N.E.2d at 122-23.

513. *Dixon*, 91 Ill. 2d at 529, 440 N.E.2d at 123. "Habilitation" is defined in the statute as including, but not being limited to "diagnosis, evaluation, medical services, residential care, day care, special living arrangements, training, education, sheltered employment, protective services, counseling and other services provided to developmentally disabled persons by developmental disabilities facilities." ILL. REV. STAT. ch. 91 1/2, § 1-111.

514. *Dixon*, 91 Ill. 2d at 529-30, 440 N.E.2d at 123 (citing ILL. REV. STAT. ch. 91 1/2, § 2-100).

515. *Id.* at 530, 440 N.E.2d at 123 (citing ILL. REV. STAT. ch. 91 1/2, § 2-102(a) (1981)). Under that section: "A recipient of services shall be provided with adequate and humane care and services in the least restrictive environment, pursuant to an individual services plan, which shall be formulated and periodically reviewed with the participation of the recipient to the extent feasible" ILL. REV. STAT. ch. 91 1/2, § 2-102(a).

516. *Dixon*, 91 Ill. 2d at 534, 440 N.E.2d at 125.

517. *Id.* at 535, 440 N.E.2d at 125.

518. *Id.* (quoting *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)); *cf.* *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir.), *cert. denied*, 106 S. Ct. 1992 and 107 S. Ct. 235 (1986); *see also Savastano v. Prevost*, 66 N.Y.2d 47, 485 N.E.2d 213, 495 N.Y.S.2d 6 (1985) (mandamus does not lie under state law to create mandatory duty on part of state commissioner of mental health to transfer certain mentally retarded patients to state facility for the retarded; right to treatment issue not reached).

2. The right to refuse treatment

a. introduction

As of 1978, one of the most influential law review articles on the right to refuse treatment⁵¹⁹ characterized then-existing state regulatory legislation as "a patchwork of inconsistencies and omissions that offers committed persons little real protection from coerced treatment."⁵²⁰ At least thirteen states at that time, including the District of Columbia, had no requirement of any sort mandating informed consent prior to the imposition of psychiatric treatment.⁵²¹ Several of the states that regulated the subject matter limited the scope of statutory protections to interventions that were not "standard psychiatric treatment"⁵²² or to "intrusive,"⁵²³ "hazardous,"⁵²⁴ or "unnecessary"⁵²⁵ treatment. In most cases, substituted consent of a close relative could be sought to override a patient's desire to refuse,⁵²⁶ and the statutory provisions offered "few concrete protections for the involuntarily committed mental patient."⁵²⁷

On the specific issue of drug treatment, several states did provide that patients could not be administered "unnecessary or excessive"⁵²⁸ or "experimental"⁵²⁹ medication, and, in at least three jurisdictions, voluntary patients had an absolute right to refuse medication.⁵³⁰ In other

519. Plotkin, *supra* note 234. Plotkin's article has been cited in *Mills v. Rogers*, 457 U.S. 291, 297 n.9 (1982); *Lojuk v. Quandt*, 706 F.2d 1456, 1466 (7th Cir. 1983); *Davis v. Hubbard*, 506 F. Supp. 915, 927 n.10 (N.D. Ohio 1980); *Rennie v. Klein*, 462 F. Supp. 1131, 1136 (D.N.J. 1978), *later proceeding*, 476 F. Supp. 1294 (D.N.J. 1979), *modified and remanded*, 653 F.2d 836, 853 n.8 (3d Cir. 1981), *vacated and remanded*, 458 U.S. 1119 (1982), *on remand*, 720 F.2d 266, 276 n.3 (3d Cir. 1983). Plotkin's methodology is criticized, however, in Gutheil & Appelbaum, "Mind Control," "Synthetic Sanity," "Artificial Competence," and *Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 HOFSTRA L. REV. 77, 88 n.57 (1983-84).

520. Plotkin, *supra* note 234, at 498.

521. *Id.* at 498 n.229. See generally *id.* at 504 app.

522. See, e.g., GA. CODE ANN. § 88-502.4(c) (1986).

523. KY. REV. STAT. ANN. § 202A.191(1)(g) (Baldwin 1985).

524. KAN. STAT. ANN. § 59-2929(6) (1983).

525. WIS. STAT. § 51.61(1)(h) (1985).

526. See, e.g., ALASKA STAT. § 47.30.130(b) (repealed 1981); CONN. GEN. STAT. ANN. § 17-206d(6) (West Supp. 1986).

527. Plotkin, *supra* note 234, at 499.

528. MONT. CODE ANN. § 53-21-145 (1985).

529. KAN. STAT. ANN. § 59-2929(6).

530. See, e.g., N.H. REV. STAT. ANN. § 135-B:15 (Supp. 1985); N.J. STAT. ANN. 30:4-24.2d(1) (West 1981); PA. STAT. ANN. tit. 50, § 7206 (Purdon Supp. 1986). A New Jersey state trial court interpreted that state's statute to imply that involuntarily committed patients did *not* have the right to refuse treatment. See *In re Hospitalization of B.*, 156 N.J. Super. 231, 383 A.2d 760 (Law Div. 1977), a holding which led, in significant part to the litigation in *Rennie*. See *supra* note 14 for the history of this litigation.

states, however, statutes specifically empowered institutions to administer "adequate medical and psychiatric care and treatment"⁵³¹ and stipulated that all treatment is the "sole responsibility" of the treating doctor.⁵³² In short, prior to the major constitutional litigation in *Rennie v. Klein*⁵³³ and *Rogers v. Okin*⁵³⁴ sketching the constitutional contours of the involuntarily committed patient's right to refuse medication,⁵³⁵ few jurisdictions provided meaningful protections through state-level patients' bills of rights.

b. litigation prior to Rennie and Rogers

Several pre-1982 cases relied on state patients' bills of rights to find that involuntarily committed mentally disabled persons had a right to refuse treatment.⁵³⁶ The Colorado Supreme Court⁵³⁷ interpreted that state's statutes⁵³⁸ and common law⁵³⁹ to conclude that an involuntary patient had a right to withhold consent to the administration of an antipsychotic drug⁵⁴⁰ in "non-emergency circumstances."⁵⁴¹

Similarly, the Oklahoma Supreme Court read then-recent amend-

531. TEX. REV. CIV. STAT. ANN. art. 5547-70 (1958) (recodified as TEX. REV. CIV. STAT. ANN. art. 5547-82 (Vernon Supp. 1986)).

532. OR. REV. STAT. § 426.070(6) (1985).

533. *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978), 476 F. Supp. 1294 (D.N.J. 1979) (supplemental opinion), *modified*, 653 F.2d 836 (3d Cir. 1981), *vacated and remanded*, 458 U.S. 1119 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983).

534. *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), *modified*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982), *on remand*, 738 F.2d 1 (1st Cir. 1984).

535. See, e.g., Perlin, *supra* note 72.

536. But see *In re Hospitalization of B.*, 156 N.J. Super. 231, 383 A.2d 760 (1977), discussed *supra* at note 530.

537. *Goedecke v. State*, 198 Colo. 407, 603 P.2d 123 (1979).

538. The Colorado Supreme Court read the "entire tenor of the . . . [mental health statutes] to recognize and protect the dignity and legal rights of patients treated pursuant to its provisions." *Id.* at 410, 603 P.2d at 125 (footnote omitted). See, e.g., COLO. REV. STAT. § 27-10-101(1) (Supp. 1986) (purpose of law); *id.*, § 27-10-104 (1986) (no forfeiture of rights by reason of being treated); *id.* § 27-10-116 (Supp. 1986) (right to treatment). See generally *Goedecke*, 198 Colo. at 410 n.6, 603 P.2d at 125 n.6.

539. The court cited with approval Justice Cardozo's famous language from *Schloendorff* that "every human being of adult years and sound mind has a right to determine what shall be done with his own body." *Goedecke*, 198 Colo. at 411, 603 P.2d at 125 (quoting *Schloendorff v. New York Hosp.*, 211 N.Y. 125, 105 N.E. 92, 93 (1914)). The Court also cited Colorado state cases that acknowledged "the physician's obligation to obtain the patient's informed consent not only for surgery, but also for treatment with drugs having possible harmful side effects." *Id.* at 411 nn.7-8, 603 P.2d at 125 nn.7-8.

540. In this case, the antipsychotic drug is prolixin decanoate. *Id.* at 409, 603 P.2d at 123.

541. *Id.* at 411, 603 P.2d at 125; see also *In re Freeman*, 636 P.2d 1334, 1335 (Colo. Ct. App. 1981) (enforcing the holding of *Goedecke*).

ments to that state's mental health code⁵⁴² as a "credible reform to end, in some areas, the blanket denial of personal rights to patients in mental institutions."⁵⁴³ It adopted the reasoning and holdings of the trial courts in *Rennie* and *Rogers* to hold that legally competent adults involuntarily admitted to state mental hospitals had the right to consent to the administration of antipsychotic drugs.⁵⁴⁴

c. litigation since Rennie and Rogers

The Supreme Court's decision in *Mills v. Rogers*⁵⁴⁵ and the Third Circuit's decision in *Rennie v. Klein*⁵⁴⁶ following the Supreme Court's remand⁵⁴⁷ are not without their ambiguities⁵⁴⁸ and the law remains in a state of flux.⁵⁴⁹ Subsequent developments have not justified many of the Cassandra-esque interpretations which immediately followed in the wake of the decisions.⁵⁵⁰ Four years later, "in most jurisdictions, [the right to refuse is] alive and well."⁵⁵¹

542. See OKLA. STAT. ANN. tit. 43A, §§ 54.1, 64 (West 1979).

543. *In re K.K.B.*, 609 P.2d 747, 749 (Okla. 1980). For an evaluation of the predecessor law, see generally Ginsberg, *Civil Rights of the Mentally Disabled in Oklahoma*, 20 OKLA. L. REV. 117, 127-30, 134 (1967).

544. *K.K.B.*, 609 P.2d at 749-52. The court specifically noted that "[t]here is no support in common law for the proposition that treatment, medical or psychiatric, constitutes a legally nonreversible medical decision." *Id.* at 751.

545. 457 U.S. 291.

546. 720 F.2d 266.

547. 458 U.S. 1119 (1982).

548. See Perlin, *supra* note 72.

549. See Perlin, *supra* note 74, at 8.

550. See, e.g., Note, *supra* note 235, at 1727 ("substantive remedy . . . effectively extinguished in 1982 by the Supreme Court"); Kemna, *supra* note 234, at 122 (Supreme Court "virtually extinguish[ed] . . . [the] right"); cf. Note, *Right to Refuse Antipsychotic Medication: A Proposal for Legislative Consideration*, 17 IND. L. REV. 1035, 1051 (1984) ("remand leaves uncertain both the scope of the federal right to refuse antipsychotic medication and the standards to be used by state mental institutions in order to protect this right").

551. Perlin, *The Right to Refuse Treatment: Quo Vadis?, Directions in Psychiatry* (Hatherleigh Co.) vol. 6, lesson 14 (1986).

For a full analysis of the impact of state law upon the ultimate decision in *Rogers*, see *Rogers v. Commissioner*, 390 Mass. 489, 458 N.E.2d 308 (1983). This aspect of *Rogers* is considered carefully in Note, *Medical Law—The Right to Refuse Antipsychotic Drug Treatment: Substantive Rights and Procedural Guidelines in Massachusetts*, 7 W. NEW ENG. L. REV. 125 (1984).

For a recent state statute specifically elaborating on the right to refuse medication (and generally following the procedures approved in *Rennie*), see MD. HEALTH-GEN. CODE ANN. § 10-708 (Supp. 1985). For a statute mandating the provision to patients of certain substantive information about medications, see ALASKA STAT. § 47.30.825(c) (1985) ("A patient has the right to know the name of medication that the patient is asked to take, what its purpose is, and what side effects may occur with this medication"). But see *id.* § 47.30.825(e) ("Psychotropic medication shall be administered only on the order of a licensed physician when the physician

Thus, in Arizona⁵⁵² and Colorado,⁵⁵³ state appellate courts have underscored that state law required more extensive procedural and substantive protections than did the federal Constitution.⁵⁵⁴ The Arizona Court of Appeals followed state statutory law⁵⁵⁵ in ordering defendants to promulgate appropriate regulations governing the use of psychotropic drugs as restraints and written agency procedures as to the use of such drugs.⁵⁵⁶ The Colorado Supreme Court construed state law⁵⁵⁷ to mandate strict protections, including, in most circumstances,⁵⁵⁸ a pre-administration adversary hearing,⁵⁵⁹ and adherence to the principle of the least restrictive alternative in decisions to drug.⁵⁶⁰

Other state statutory cases have considered the extent of procedural due process protections available in cases dealing with other treatments

determines that this medication is in the best interest of the patient or will prevent serious harm to others").

A model state statute is suggested in Note, *supra* note 550, at 1053-63. See also Note, *Pathway Through the Psychotropic Jungle: The Right to Refuse Psychotropic Drugs in Illinois*, 18 MARSHALL L. REV. 407 (1985) (analyzing ILL. REV. STAT. ch. 91 1/2, ¶ 2-107 (Supp. 1985)).

552. *Anderson v. State*, 135 Ariz. 578, 663 P.2d 570 (1982).

553. *People v. Medina*, 705 P.2d 961 (Colo. 1985).

554. See, e.g., *Anderson*, 135 Ariz. at 583, 663 P.2d at 575 ("Arizona law requires considerably more than the minimal requirements of the federal constitution").

555. See, e.g., ARIZ. REV. STAT. ANN. § 36-513 (1986). For an early and comprehensive analysis of the Arizona patients' rights law, see White, *Protection Following Commitment: Enforcing the Rights of Persons Confined in Arizona Mental Health Facilities*, 17 ARIZ. L. REV. 1090 (1975).

556. *Anderson*, 135 Ariz. at 585-87, 663 P.2d at 577-79; cf. *Large v. Superior Court*, 148 Ariz. 229, 236, 714 P.2d 399, 406 (1986) (forcible administration of psychotropic drugs to treat mentally ill convict in nonemergency situation violated state constitution). The *Large* court noted that state patients' bill of rights applied only to *civilly* committed patients. *Id.* at 239, 714 P.2d at 409; see also *Large*, 148 Ariz. at 240-41, 714 P.2d at 410-11 (Cameron, J., dissenting) ("majority does not go far enough in protecting [plaintiff's] right of privacy"; dissent would allow absolute right to refuse). See generally *infra* text accompanying notes 572-85 (discussing *Keyhea v. Rushen*, 178 Cal. App. 3d 526, 223 Cal. Rptr. 746 (1986)).

557. COLO. REV. STAT. § 27-10-101 to -129 (Supp. 1986).

558. The court excluded cases where there was an emergency which posed an "immediate and substantial threat to the life or safety of the patient or others in the institution" *Medina*, 705 P.2d at 963.

559. *Id.*

560. *Id.* at 974. Adherence to the constitutional principle of the least restrictive alternative had been abandoned in the *Rennie* remand opinion in light of the Supreme Court's direction for the third circuit to reconsider its prior decision in light of *Youngberg v. Romeo*, 457 U.S. 307 (1982). See *Rennie*, 720 F.2d at 69.

For other recent cases construing state statutes dealing with drugging issues, see, e.g., *Stensvad v. Reivitz*, 601 F. Supp. 128 (W.D. Wis. 1985); *Kolocotronis v. Ritterbusch*, 667 S.W.2d 430 (Mo. Ct. App. 1984); *Savastano v. Saribeyoglu*, 126 Misc. 2d 52, 480 N.Y.S.2d 977 (N.Y. Sup. Ct. 1984); *In re L.R.*, 146 Vt. 17, 497 A.2d 753 (1985).

such as electroshock therapy.⁵⁶¹ Thus, after the Kentucky Court of Appeals construed a state scheme⁵⁶² to bar the compulsory imposition of such treatment in the absence of a finding of an emergency or a judicial declaration of incompetence,⁵⁶³ the state legislature "codified the . . . decision,"⁵⁶⁴ by requiring due process hearings at which the court must consider the patient's competence to consent to the treatment and the threat which would be posed by the patient if he were not to be so treated.⁵⁶⁵

In California, an intermediate appellate court read state electroshock law⁵⁶⁶ together with the state's evidence code⁵⁶⁷ to mandate a finding that clear and convincing evidence was required to support an order that an incompetent community resident lacked the capacity to consent to or to refuse electroshock therapy.⁵⁶⁸ The court relied on prior case law,⁵⁶⁹ the extensive procedural safeguards built into the relevant state statutory sections,⁵⁷⁰ and a state attorney general's opinion which had found that the incompetent person's right to refuse medical treat-

561. See generally Plotkin, *supra* note 234, at 471-72; Note, *Regulation of Electroconvulsive Therapy*, 75 MICH. L. REV. 363 (1976); Comment, *Informed Consent and the Mental Patient: California Recognizes a Mental Patient's Right to Refuse Psychosurgery and Shock Treatment*, 15 SANTA CLARA L. REV. 725 (1975); see, e.g., *Lojuk v. Quandt*, 706 F.2d 1456 (7th Cir. 1983).

562. Under the then-existing statute, the state's Secretary of the Department of Human Resources was empowered to adopt rules and regulations enforcing certain patients' rights, including the right to "refuse intrusive treatments, such as electroshock therapy . . ." KY. REV. STAT. ANN. § 202A.180(7) (Michie/Bobbs-Merrill 1977). Pursuant to this statute, a regulation was adopted providing for the provision of electroshock therapy to a patient if a court determined that such treatment was "in the best interest of the patient." 902 KY. ADMIN. REGS. 12:020, § 8 (1981); see *Gundy v. Pauley*, 619 S.W.2d 730, 731 (Ky. Ct. App. 1986).

563. *Gundy v. Pauley*, 619 S.W.2d at 731. The court cited the district court's initial opinion in *Rennie*, 462 F. Supp. 1131, and the First Circuit's initial opinion in *Rogers*, 634 F.2d 650, in support of the proposition that a person generally "has a constitutionally protected right to decide for himself whether to submit to serious and potentially harmful medical treatment." *Gundy*, 619 S.W.2d at 731.

564. Oberst & Hunt, *Administrative and Constitutional Law*, 71 KY. L.J. 417, 436 (1982-83).

565. See KY. REV. STAT. ANN. § 202A.196(3) (Michie/Bobbs-Merrill 1983); see also *In re W.S.*, 152 N.J. Super. 298, 301-03, 377 A.2d 969, 971 Juv. Dom. Rel. Ct. 1977) (construing N.J. STAT. ANN. 30:4-24.2d (2) (West 1981), and holding that "[m]entally ill patients have the right to be informed of and participate in the decision-making aspects of their treatment").

566. See CAL. WELF. & INST. CODE §§ 5325(f), 5325.1, 5326.2, 5326.5, 5326.7 (1984); see also *Aden v. Younger*, 57 Cal. App. 3d 662, 129 Cal. Rptr. 535 (1976) (pre-*Rennie* and pre-*Rogers* analysis of similar aspects of the predecessor law); see generally, Hoffman, *The "Due Process" Rights of Minors in Mental Hospitals*, 13 U.S.F. L. REV. 63, 63 n.3 (1978).

567. CAL. EVID. CODE §§ 115, 160 (West 1965).

568. *Lillian F. v. Superior Court*, 160 Cal. App. 3d 314, 324-25, 206 Cal. Rptr. 603, 609 (1984).

569. *Id.* at 321, 206 Cal. Rptr. at 606-07.

570. *Id.* at 318-22, 206 Cal. Rptr. at 604-07.

ment " 'involves such fundamental rights as . . . the right to the inviolability of one's person.' " ⁵⁷¹

Most recently, in *Keyhea v. Rushen*,⁵⁷² a California intermediate appellate court construed a state statute⁵⁷³ to provide mentally disabled prisoners with the right to a judicial determination of their competency to refuse treatment before they can be subjected to long-term involuntary psychotropic medication.⁵⁷⁴ In the course of its decision, the *Keyhea* court tracked the use of psychotropic drugs in cases involving institutional populations,⁵⁷⁵ noting that such medications serve as "a primary tool of public mental health professionals for treating serious mental disorders."⁵⁷⁶ The court also found that these drugs "have many serious side effects,"⁵⁷⁷ and " 'possess a remarkable potential for undermining individual will and self-direction, thereby producing a psychological state of unusual receptiveness to the directions of custodians.' " ⁵⁷⁸

The *Keyhea* court construed state law—which it characterized as a "prison 'bill of rights' " ⁵⁷⁹—to effectuate an absolute grant of civil rights to prisoners (excepting where deprivation is necessary for security or safety reasons) "without cost/benefit considerations, presumably because of the importance of civil rights in a free society."⁵⁸⁰ It also read the provision of state law governing the involuntary medication of non-prisoners under conservatorship⁵⁸¹ to mandate a prior judicial determination as to incompetency before the sanctioning of "involuntary long-term psychotropic medication."⁵⁸²

571. *Id.* at 322, 206 Cal. Rptr. at 607 (quoting 58 Op. Cal. Att'y Gen. 849-50 (1975)); see also *In re Fadley*, 159 Cal. App. 3d 440, 446-47, 205 Cal. Rptr. 572, 575-76 (1984) (least restrictive alternative inquiry not necessary in electroshock determination; trial court's examination of issue harmless error). *Lillian F.* and *Fadley* were decided by different panels of the court of appeal sitting in different districts.

572. See CAL. PENAL CODE § 2600 (West 1975) (prisoners may be deprived of only such rights "as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public."); see generally *De Lancie v. Superior Court*, 31 Cal. 3d 865, 647 P.2d 142, 183 Cal. Rptr. 866 (1982) (discussing legislative history).

573. 178 Cal. App. 3d 526, 223 Cal. Rptr. 746 (1986).

574. *Id.* at 527, 223 Cal. Rptr. at 747.

575. *Id.*

576. *Id.* at 531, 223 Cal. Rptr. at 747.

577. *Id.* at 531, 223 Cal. Rptr. at 748.

578. *Id.* (quoting Gelman, *Mental Hospital Drugs, Professionalism and the Constitution*, 72 GEO. L.J. 1725, 1751 (1984)).

579. *Id.* at 534, 223 Cal. Rptr. at 750 (quoting *In re Harrell*, 2 Cal. 3d 675, 698, 470 P.2d 640, 655, 87 Cal. Rptr. 504, 522 (1970), *cert. denied*, 401 U.S. 914 (1971)).

580. *Keyhea*, 178 Cal. App. 3d at 534, 223 Cal. Rptr. at 750.

581. CAL. WELF. & INST. CODE § 5358 (West Supp. 1987); *id.* § 5358.2 (West 1984).

582. *Keyhea*, 178 Cal. App. 3d at 536, 223 Cal. Rptr. at 751.

On the question of whether there was a general constitutional or common-law right on the part of nonprisoners to refuse the administration of such medication, the *Keyhea* court noted the "conflict" in other jurisdictions,⁵⁸³ but declined to resolve the question because the right was provided under state statute.⁵⁸⁴ After finding that nonprisoners thus had a right to a prior competency hearing, the court found that there would be no threat to prison security if such a right were extended to prisoners as well.⁵⁸⁵

d. conclusion

The Supreme Court's decision to "sidestep"⁵⁸⁶ the constitutional issue of the right to refuse treatment in *Mills* has had little apparent impact on state courts interpreting state statutes in analogous cases. In fact, it may have strengthened the resolve of state court judges to articulate the right in question clearly and broadly. For instance, the California court concluded *Keyhea*, the prison case, with this ringing declaration:

We conclude that state prisoners, like nonprisoners under the [state] statutory scheme, are entitled to a judicial determination of their competency to refuse treatment before they can be subjected to long-term involuntary psychotropic medication. Mental health professionals and prison administrators may find this requirement cumbersome, but this is a price of life in a free society. Forced drugging is one of the earmarks of the gulag. It should be permitted in state institutions only after adherence to stringent substantive and procedural safeguards.⁵⁸⁷

3. Other institutional rights and rights in the community

a. "other" institutional rights

There has not been a significant amount of litigation construing state statutory sections providing patients with "other"⁵⁸⁸ substantive in-

583. *Id.* at 540, 223 Cal. Rptr. at 754 (citing *Rennie v. Klein*, 720 F.2d 266, 266 (3d Cir. 1983); *Goedecke v. State Dep't of Trust*, 198 Colo. 407, 410-411, 603 P.2d 123, 125 (1979); *In re K.K.B.*, 609 P.2d 747, 751-52 (Okla. 1980)).

584. *Keyhea*, 178 Cal. App. 3d at 541, 223 Cal. Rptr. at 754-55.

585. *Id.* at 542, 223 Cal. Rptr. at 755.

586. *See supra* note 96.

587. *Keyhea*, 178 Cal. App. 3d at 542, 223 Cal. Rptr. at 755-56. This position, it should be made clear, is not a unanimous one in prison cases. *See, e.g.*, *Gilliam v. Martin*, 589 F. Supp. 680, 682-83 (W.D. Okla. 1984) (administration of psychotropic medication did not violate prisoners' federal constitutional right to be free from cruel and unusual punishment).

588. *See generally* Perlin, *supra* note 368.

stitutional rights.⁵⁸⁹ In earlier cases involving the inspection of hospital records, courts had interpreted such laws to entitle former patients to inspect their records upon a showing of materiality or relevancy to subsequent litigation,⁵⁹⁰ but to bar such inspection by a patient's friend where such examination would not be in the patient's "best interest."⁵⁹¹ In a more recent action, a federal district court denied an application for summary judgment and ordered a trial on the merits to determine whether seemingly conflicting provisions of Colorado's patients' bill of rights controlling release of medical records⁵⁹² violated plaintiff's constitutional rights to a fair commitment hearing.⁵⁹³ In other matters, courts have held that visitation by a friend could be denied where such a visit would not be in the patient's "best interests."⁵⁹⁴ In another case, despite the entry of an omnibus federal consent order in an institutional conditions suit,⁵⁹⁵ a resident at the institution in question was found to have the right to file a civil action pursuant to the state patients' bill of rights challenging a staff decision which precluded her from receiving mail addressed to her under certain aliases.⁵⁹⁶

b. rights in the community

Statutory community rights cases have established a right to deinstitutionalization and aftercare,⁵⁹⁷ to be free from discrimination in housing

589. For commentaries on some of the relevant statutes, see, e.g., Dix, *The 1983 Revision of the Texas Mental Health Code*, 16 ST. MARY'S L.J. 41, 112-16 (1984); Janus & Wolfson, *The Minnesota Commitment Act of 1982: Summary and Analysis*, 6 HAMLINE L. REV. 41, 52-59 (1983); White, *supra* note 555, at 1093-95, 1106-14; Comment, *Pennsylvania's Commitment: The Mental Health Procedures Act*, 50 TEMP. L.Q. 1035, 1037-47 (1977); Comment, *The Louisiana Mental Health Law of 1977: An Analysis and a Critique*, 52 TUL. L. REV. 542, 555-56 (1978).

590. *Morris v. Hoerster*, 348 S.W.2d 642, 644 (Tex. Civ. App. 1961) (construing TEX. REV. CIV. STAT. ANN. art. 5547-87(a)(1) (Vernon 1958)).

591. *Myrick v. Superintendent of Worcester State Hosp.*, 334 Mass. 42, 45, 133 N.E.2d 487, 489 (1956).

592. See COLO. REV. STAT. § 25-1-801 (Supp. 1986) (restricting release of medical records which, in the opinion of a qualified mental health professional, would have a "significant negative psychological impact" on the patient); *id.* § 27-10-116(1)(a) (providing for the general availability of treatment records).

593. *Brown v. Jensen*, 572 F. Supp. 193, 199-200 (D. Colo. 1983). See generally *Gotkin v. Miller*, 514 F.2d 125, 129 n.6 (2d Cir. 1975) (in granting hospitalized patients some degree of property interest in their records, state is not constitutionally required to grant patients all "traditional incidences" of property rights, including the right to inspect and copy such records).

594. *Myrick*, 334 Mass. at 42, 133 N.E.2d at 489.

595. See *Goodwin v. Shapiro*, 545 F. Supp. 826 (D.N.J. 1982).

596. *Smith v. Shapiro*, 197 N.J. Super. 320, 328-29, 484 A.2d 1282, 1286-87 (App. Div. 1984), *cert. denied*, 101 N.J. 235, 501 A.2d 912 (1985).

597. See, e.g., *Dixon v. Weinberger*, 405 F. Supp. 974 (D.D.C. 1975).

and zoning decisions,⁵⁹⁸ and to procedural due process prior to deciding whether to undergo sterilization.⁵⁹⁹ In one recent case, the New York Court of Appeals ordered a trial on behalf of deinstitutionalized, homeless persons and hospitalized patients who met statutory discharge criteria but for whom no adequate aftercare placement was available.⁶⁰⁰ Subsequently, the trial court partially denied defendant's dismissal motion on the grounds that a state statute provided plaintiffs with the right to a written "service plan" including "a specific recommendation of the type of residence in which the patient is to live."⁶⁰¹

F. Conclusion

Thus, although developments involving state patients' bills of rights have received neither the attention nor the fanfare of constitutional developments in parallel substantive areas, recent decisions reflect a willingness on the part of most of the state courts that have faced these questions to interpret statutory rights broadly and expansively even in an environment where the Supreme Court has made it clear that such scope of decision is not required under the federal Constitution. However, because relatively little attention has been paid to this body of case law, its impact has not yet been particularly significant or far-reaching.

IV. CONCLUSION

Just as our view of former golden ages—in the arts and recreation—may have been distorted a bit by our youth and by the relative novelty of the subject matter in question (at least its newness to *us*), so too perhaps have we unnecessarily deified the golden age of federal litigation on behalf of the mentally disabled. While there is no question that the early cases—*Jackson v. Indiana*; *Wyatt v. Stickney*; *O'Connor v. Donaldson*; the trial court decisions in *Rennie v. Klein*, *Mills v. Rogers*, and *Pennhurst State School & Hospital v. Halderman*—articulated a vision of

598. See, e.g., *Commonwealth v. Ogontz Area Neighbors Ass'n*, 505 Pa. 614, 483 A.2d 448 (1984); *Bellarmino Hills Ass'n v. The Residential Sys.*, 84 Mich. App. 554, 269 N.W.2d 673 (1978); *State ex rel. Thelen v. City of Missoula*, 168 Mont. 375, 543 P.2d 173 (1975).

599. For discussions of the pertinent procedural and substantive issues, see *Wentzel v. Montgomery Gen. Hosp., Inc.*, 293 Md. 685, 447 A.2d 1244 (1982), *cert. denied*, 459 U.S. 1147 (1983); *In re Penny N.*, 120 N.H. 269, 414 A.2d 541 (1980); *In re Grady*, 85 N.J. 235, 426 A.2d 467 (1981); *In re Truesdell*, 63 N.C. App. 258, 304 S.E.2d 793 (1983), *modified*, 313 N.C. 421, 329 S.E.2d 630 (1985); *In re Terwilliger*, 304 Pa. Super. 553, 450 A.2d 1376 (1982); *In re Eberhardy*, 102 Wis. 2d 539, 307 N.W.2d 881 (1981).

600. *Klostermann v. Cuomo*, 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984).

601. *Klostermann v. Cuomo*, 126 Misc. 2d 247, 252, 481 N.Y.S.2d 580, 585 (Sup. Ct. 1984) (construing N.Y. MENTAL HYG. LAW § 29.15(g)(2) (McKinney 1978 & Supp. 1986)).

equal rights for the handicapped that has neither been duplicated nor fulfilled in the intervening decade, examination of the first stages of litigation under state constitutions and state patients' rights statutes reveals that many of the same rights may be vindicated in state courts.

Although state tribunals are not without their problems in cases involving institutional relief (especially when there are serious financial implications),⁶⁰² the meaning of *Pennhurst II* is stark for litigators representing institutionalized populations seeking broad-based relief in federal court.⁶⁰³ If the Supreme Court, as Justice Stevens has charged, has forgotten "its primary role as the protector of the citizen and not the warden or the prosecutor,"⁶⁰⁴ then it appears likely that litigation in the next "golden age" will unfold on the battlefields of state courts. State courts may truly be, for the mentally disabled seeking judicial relief, the last frontier.

602. See generally Neuborne, *supra* note 33.

603. See *supra* text accompanying notes 31-49

604. *Florida v. Meyers*, 466 U.S. 380, 387 (1984) (Stevens, J., dissenting); see also *Colorado v. Connelly*, 106 S. Ct. 785, 787 (1986) (Brennan, J., dissenting) (objecting to grant of certiorari and to the Court's "willingness to take special judicial action to assist the prosecutor"), 107 S. Ct. 515, 525 (1986) (dissenting on question of whether criminal defendant's mental disability rendered his *Miranda* waiver ineffective).

